TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1884.

THE NORTHEHN PACIFIC RAILROAD COMPANY,
APPELLANT,

vs.

IVER L. ROCKNE, COUNTY TREASURER OF TRAILL COUNTY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

FILED OCTOBER 14, 1884.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 1075.

THE NORTHEHN PACIFIC RAILROAD COMPANY, APPELLANT,

vs.

IVER L. ROCKNE, COUNTY TREASURER OF TRAIL COUNTY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

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1 Supreme Court, Territory of Dakota. October Term, 1882.

NORTHERN PACIFIC RAILROAD CO., Appellant,
vs.
IVER L. ROCKNE, County Treasurer of Traill County, Respondent.

Paper Book.

W. P. Clough, attorney for plaintiff.

B. S. WILLIAMS, *Clerk.*

Filed September 30, 1882.

2 TRANSCRIPT.

Notice of Appeal.

TERRITORY OF DAKOTA, *Traill County:*

District Court.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
against
IVER L. ROCKNE, County Treasurer of Traill County, Defendant. } No. 129.

Please take notice that the plaintiff in the above-entitled suit hereby appeals to the supreme court of said Territory from the judgment in said suit rendered this day.

Dated September 1, 1882. W. P. CLOUGH,
Attorney for Plaintiff.

To H. F. MILLER, Esq., *Attorney for Defendant.*

3 Due service of within notice is hereby admitted, and the execution and service of an appeal bond by the plaintiff is hereby waived.

Dated September 1, 1882. H. F. MILLER,
Attorney for Defendant.

Judgment.

TERRITORY OF DAKOTA, *Traill County:*

District Court.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
against
IVER L. ROCKNE, County Treasurer of Traill County, Defendant.

This cause having been tried before the court without a jury, and the court having made and filed its findings of fact, and its conclusions of law thereon, wherein and whereby it determined that the defendant is entitled to judgment in the said action:

Now, therefore, it is adjudged that this action be, and the same hereby is, dismissed out of court, and that the defendant recover from the plaintiff his costs and disbursements in this suit, amounting to the sum of ten dollars.

Dated September 1, A. D. 1882. S. A. HUDSON, *Judge.*

4 *Amended Findings.*

TERRITORY OF DAKOTA:

District Court for the County of Traill.

NORTHERN PACIFIC RAILROAD COMPANY
against
IVER L. ROCKNE, County Treasurer of Traill County, Defendant.

This cause coming on for trial before the court, a trial by jury having been waived by oral consent of the attorneys for the respective parties in open court, entered in the minutes—W. P. Clough and Benton & McConnell, Esqs., appearing for the plaintiff, and H. F. Miller, Esq., appearing for the defendant—and upon the proofs offered and the stipulations filed by the respective parties, and after argument of counsel, and upon due consideration, the court finds for facts in this case the following, viz:

First. That the plaintiff is a corporation duly organized and existing under that certain act of Congress, approved July 2, 1864, entitled "An act granting land to aid in the construction of a railroad and telegraph line from Lake Superior to Pugent Sound, on the Pacific coast, by the northern route, and under those certain subsequent acts and joint resolutions of Congress relating to the same subject-matter."

Second. That in and by the said act of July 2, 1864, among other things, it is provided as follows:

"And be it further enacted, That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and
5 assigns, for the purpose of aiding in the construction of said railroad and telegraph line, * * * alternate sections of public land, not mineral, designated by odd numbers, to the amount of 20 alternate sections per mile on each side of said railroad line as said company may adopt, through the territory of the United States, and 10 alternate sections of land per mile on each side of said railroad whenever it passes through any State," etc. Then follow the conditions subsequent to be performed by the said railroad company to give it a complete title to the said lands, and to a patent as the evidence of such title.

Section 20 is as follows: "And be it further enacted, That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, Congress may at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend, or repeal this act."

By an act of Congress approved July 15, 1870, among other things appropriating money for the survey of the public lands within the limits of the land grant of the Northern Pacific Railroad Company,

it is provided "that before any land granted to said company by the United States shall be conveyed to any party entitled thereto under any of the acts incorporating or relating to said company, there shall first be paid into the Treasury of the United States the cost of survey, selecting, and conveying the same by the said company or party in interest."

Third. That under and in pursuance of said several acts and resolutions of Congress the plaintiff has built and caused to be built and put in operation a continuous line of railroad and tele-
6 graph, extending from the waters of Lake Superior, at Duluth, in the State of Minnesota, westerly, across the said State and across the Territory of Dakota, to and beyond the Missouri river, and of the character and materials specified in the said acts; and everything has been done by the said railroad company required by the terms of the grant, to enable the said company to acquire a complete and perfect title to the lands in controversy in this action, except as respects the payment of the costs of survey, etc., required by the act of July 15, 1870, above mentioned. All that part of the said railroad within the Territory of Dakota has been located and built since July 15, 1870. The Government of the United States, since the passage of the said act of Congress of July 15, 1870, has caused the lands described in the complaint to be surveyed at its own expense, no part of which has ever been repaid it by said company. The patents for the said lands described in the complaint, or any of them, have never been issued to the said railroad company, or to any person for said company, and the Government refuses to issue said patents until the payment for survey and selecting the said lands, as above mentioned, and required by said law of 1870, has been made.

Fourth. That the lands mentioned and described in the schedule annexed to the plaintiff's complaint, and made a part thereof, were, at the time said acts were passed, and the said railroad located through the Territory of Dakota, a part of the public domain of the United States, and not any part of the right of way mentioned in said act, and had never been sold, reserved, granted, or otherwise appropriated, except as above mentioned, and were free of pre-emption and other rights, and were situated within a distance of 40 miles of the line of the plaintiff's said railroad.

Fifth. That in the year 1880 the officers of the said county of
7 Traill, authorized by the laws of this Territory to assess property therein for the purposes of taxation and to levy taxes therein, assessed and levied taxes upon said land for that year amounting in the aggregate to about the sum of two thousand dollars, all of which remain unpaid, and which the plaintiff refused, and still refuses, to pay; and the defendant, Iver L. Rockne, who is county treasurer of said county of Traill, did advertise and give public notice that on a certain day and place, to wit, on the first Monday in October, 1881, he would sell the said lands according to law, for the non-payment of the said taxes, and for the collection of the same.

Sixth. That the said taxes were not levied by the said officers in manner and form as prescribed by the laws of this Territory, and such proceedings were irregular in the following particulars:

1. The county assessor did not personally inspect or examine any of the lands, for the purpose of ascertaining the actual quality or value of the same.

2. That said assessor did not take and subscribe an oath and annex it to the assessment roll.

3. That the county clerk of said county did not make out a list containing said lands and showing the valuation thereof, and the several species of taxes thereon, and the total taxes, as prescribed by section 37 of chapter 28 of the Political Code of this Territory, nor did the said county clerk deliver a duplicate list to the county treasurer, showing the matters aforesaid in manner and form as prescribed by the last-mentioned section, or by sections 38, 39, and 40 of the same chapter.

4. That the county commissioners of said county did not attach to the said list their warrants, under their hands and official seals, in general terms, requiring the county treasurer of said
8 county to collect the taxes specified in such list as provided by section 40 of said chapter above mentioned, if any such lists were ever made.

Seventh. That at a session of the legislative assembly of the Territory of Dakota, held at the Territorial capital, for the year 1881, the said legislative assembly passed an act entitled "An act to legalize the assessment of Traill county, D. T., for the years 1879 and 1880," which provides as follows: "That the assessment of Territorial, county, sinking fund, land, road, poll, district-school, and other taxes for the years 1879 and 1880, in the county of Traill and Territory of Dakota, are hereby declared to be legal and effectual, and of full force and effect: Provided, however, That this act shall not be construed to apply to any unequal or unjust valuation or assessment of property, real or personal, upon the rolls of assessment, or to any errors in listing or valuing any of said property in said county. This act shall take effect and be in force from and after its passage and approval. Approved March 1, 1881."

And the said legislative assembly passed another act at the same session, and with same title, wherein it is provided as follows:

"Whereas S. B. Rouglie, assessor of Traill county, failed to attach to the assessment rolls for the years 1879 and 1880 the oath required by section 12 of the Political Code; and whereas it appears that all other acts of said assessor in reference to said assessments were done in pursuance of law; therefore, be it enacted by the legislative assembly, * * * that said assessments be, and the same are hereby, declared to be legal, and to have the same force and effect as if said assessor had attached to the said assessment rolls the oath required by said section 12. This act shall take effect and be in force from and after its passage and approval. Approved February 17, 1881."

9 Eighth. That the true and just amount of taxes due upon such property and real estate described in the complaint in this action, and due and payable by the said Northern Pacific Railroad Company, as appears by the assessment roll made by the county officers of the county of Traill, at the time of commencement of this

action, was the gross sum of ——— dollars ——— cents, and which appears upon the schedule hereto annexed and marked "A."

From the foregoing facts the court finds the following conclusions of law:

First. That the said plaintiff, The Northern Pacific Railroad Company, by its charter and the grant of lands from the Government, acquired an equitable title in fee to the lands mentioned and described in the complaint to this action, which, on the performance on the part of the said company of all the conditions subsequent required by said grant to be performed, became a complete equitable title; said company having earned the lands, nothing remained but the issuing of the patents.

Second. That the equitable title to the said lands having been fully vested in the said plaintiff, and having ceased to belong to the United States, they were liable to taxation for the year 1880, as other lands in said county, for the objects for which the said taxes were levied.

Third. That the act of Congress of July 15, 1870, requiring the said railroad company to pay the cost of surveying, selecting, and conveying the said lands granted to it by the act of July 2, 1864, as a condition precedent to its right to a patent, was inoperative and void, and furnished no legal ground for the refusal by the United States to grant the patent, and could not be set up as a reason for the exemption of said lands from taxation by said plaintiff.

Fourth. That the said plaintiff has no standing in a court of equity in asking for the restraining order of said court to prevent the collection of these taxes, and shows no equitable right to such relief by alleging that these lands are not taxable in consequence of the non-performance by said plaintiff of an obligation imposed upon it by law, and giving no good reason why it has not been performed.

Fifth. This court will not, in the exercise of its equitable jurisdiction, interfere by injunction to restrain the enforcement of tax proceedings on the ground of irregularities and errors in the assessment of the tax, or in the execution of the power conferred upon taxing officers, unless the tax is illegal or unauthorized, or the property assessed is not subject to taxation.

Sixth. That the irregularities and manner of the assessment of the lands for taxes, and the neglect of the assessor to take and subscribe on oath, and annex the same to the assessment roll, as provided by law, was cured by the subsequent acts of the legislative assembly of this Territory.

Seventh. That the neglect of the county clerk to make out a list of said lands showing the valuation thereof, as required by law, and the neglect of the county commissioners to attach to the said lists their warrants under their hands and seals, as required by law, does not furnish a ground for the interference of a court of equity to restrain the enforcement of tax proceedings, the remedy at law being sufficient in such cases.

11 Eighth. The said lands described in the complaint being liable to taxation, and the taxes assessed thereon being a legal tax, the defendant is entitled to judgment.

Dated February 15, 1882. S. A. HUDSON, *Judge.*

A true record.
Attest: F. W. AMES, *Clerk.*

Summons.

TERRITORY OF DAKOTA, *County of Traill:*

District Court.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
against
IVER L. ROCKNE, County Treasurer of Traill County, Defendant.

Territory of Dakota to the above-named defendant:

You are hereby summoned and required to answer to the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said complaint on the subscriber, at the office of Benton & McConnell, in Fargo, Cass county, in said Territory, within 30 days after the summons of this service upon you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will apply to the court for the relief demanded in the complaint.

W. P. CLOUGH,
Plaintiff's Attorney.

Dated September 30, 1881.

12 TERRITORY OF DAKOTA, *Traill County:*

District Court.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
against
IVER L. ROCKNE, County Treasurer of said Traill County, Defendant.

To the defendant above named:

Whereas the plaintiff in the above-entitled suit has exhibited his complaint to this court, verified and supported by the affidavit of R. M. Newport, by which it is made to appear that the defendant above named threatens and is about to wrongfully sell and expose for sale for taxes certain lands, in the said complaint, and in the schedule thereto annexed, mentioned, and described, and the plaintiff having filed an undertaking, executed on its behalf, for the payment to the defendant of any damages he may sustain by reason of an injunction restraining and enjoining the defendant from selling or offering to sell any of the said lands:

Now, therefore, it is ordered by the court aforesaid that the said defendant and his deputies be, and they hereby are, and each of them

is, restrained and enjoined, until the further order of the court, from selling or offering to sell for taxes any of the parcels of land in the said complaint and schedule, of which copies are hereunto annexed, mentioned and described.

Witness my hand on the first day of October, A. D. 1881.

S. A. HUDSON, *Judge.*

13 *Undertaking.*

TERRITORY OF DAKOTA, *Traill County:*

District Court.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
against
IVER L. ROCKNE, County Treasurer of Traill County, Defendant.

Whereas the plaintiff in the above entitled suit has applied to the court for, and has obtained, an order restraining the said defendant from selling, and from offering to sell, certain lands in the complaint in said suit described:

Now, therefore, we, N. K. Hubbard and Henry M. Williams, for and on behalf of the plaintiff above named, hereby undertake and agree, to and with the defendant above named, that the said plaintiff will pay to the said defendant such damages, not exceeding the sum of five hundred dollars, as the said defendant may sustain by reason of the said restraining order, if the court shall finally decide that the plaintiff was not entitled to the same.

In testimony whereof, we have hereunto set our hands, on this first day of October, A. D. 1881.

N. K. HUBBARD.
HENRY M. WILLIAMS.

14 TERRITORY OF DAKOTA, } *ss:*
Cass County, }

Personally came before me, the undersigned, a notary public in and for said county, *and* N. K. Hubbard and Henry M. Williams, who, having been by me first duly sworn, did depose and say, each for himself, that he is the same person who executed the foregoing undertaking, and that he is worth double the amount therein specified, above debts, liabilities, and property exempt from levy and sale under execution.

N. K. HUBBARD,
HENRY M. WILLIAMS.

Subscribed and sworn to before me on this first day of October, A. D. 1881.

E. C. EDDY,
Notary Public, Cass Co., D. T.

TERRITORY OF DAKOTA, *Traill County:*

District Court.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
against
IVER L. ROCKNE, County Treasurer of the County of Traill, aforesaid, Defendant.

The plaintiff, complaining of the defendant, alleges the following facts constituting its cause of action:

15 I.

The plaintiff is a corporation duly organized and existing under that certain act of Congress approved July 2, A. D. 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound and the Pacific coast by the northern route," and under those certain subsequent acts and joint resolutions of Congress relating to the same subject-matter.

II.

Under and in pursuance of the said several acts and joint resolutions of Congress the plaintiff has built, and caused to be built and put into operation, a continuous line of railroad and telegraph extending from the waters of Lake Superior, at Duluth, in the State of Minnesota, westwardly across the said State and across this Territory, and of the character and materials specified in the said acts and joint resolutions.

III.

At the time of the passage of the said acts of Congress, and at the time of the definite location of that portion of the plaintiff's said line of railroad and telegraph lying opposite the several parcels of land particularly described in the schedule hereunto annexed, all said parcels of land were part of the public domain of the United States, and none of the same had ever been reserved, sold, granted, or otherwise appropriated, and all the same were free of pre-emption and other claims and rights, and all the same were situated within the distance of forty (40) miles of the plaintiff's said line of railroad, by reason of which facts the plaintiff has acquired, and still
16 holds, the interest in all said lands conferred, and intended to be conferred, upon it by the several acts of Congress relating thereto.

IV.

In the year 1880 the officers of the said county, authorized by the laws of this Territory to assess property therein for purposes of taxation, and to levy taxes thereon, pretended to assess all the said parcels of land for the purposes of taxation, and pretended to levy certain taxes thereon, to wit: The territorial, county, town, and other taxes for that year, amounting, in the aggregate, to the sum

of two thousand dollars and upwards, all of which remained unpaid, and which plaintiff refuses to pay; and the defendant, who is, and during the year last past has been, county treasurer of the said county, and acting as such has given public notice that he will, and he threatens to, and unless restrained by this court he will, sell all the said parcels of land, beginning on the first Monday of October of the present year, at public sale, to pay the amount of the said pretended taxes thereon, and will convey and certify the same to the purchasers, in his official capacity as county treasurer of said county, by means whereof a cloud will be created upon the title of the plaintiff to the said lands.

V.

All the said pretended taxes are illegal and void, and the defendant is wholly unauthorized to sell any of the said parcels of land, or to offer any of the same for sale, for the reasons and on account of the facts following, that is to say:

First. None of the said lands have ever been taxable by the officers of the said county, nor by any other officer, nor by any
17 board of officers, holding his or their offices under the laws of this Territory, for the reason that, before the definite location or construction of any part of the said railroad within this Territory, and on July 15, A. D. 1870, the Congress of the United States passed an act, on that day approved by the President of the United States, entitled "An act making appropriations for sundry civil expenses of the Government for the year ending June 30, 1871, and for other purposes," in and by which it was, among other things, enacted and provided as follows, that is to say:

"For the survey of the public lands within the limits of the land grant of the Northen Pacific Railroad Company, in a direct line, extending from Duluth, on Lake Superior, to Georgetown, on the Red River of the North, $95,980; provided, that $5,000 of this appropriation shall be expended for office work by the surveyor general of Minnesota; and provided further, that before any land granted to said company by the United States shall be conveyed to any party entitled thereto under any of the acts incorporating or relating to said company, there shall be first paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same, by the said company or party in interest."

The said act of Congress has never been repealed; and since the passage thereof, and long before the levy of said pretended taxes, the Government of the United States had expended large sums of money, amounting in the aggregate to the sum of more than $100,000, in surveying the lands lying within this Territory, granted and intended to be granted in and by said acts and joint resolutions of Congress, including the lands described in the annexed schedule, no part whereof has ever been repaid; by reason whereof the said Government has, ever since the incurring of such expenses, claimed,

and it still claims, a lien upon all said lands, including the
18 lands described in the annexed schedule, for the amount of such surveying expenses, and it has refused, and still refuses, to convey any of said lands, including the lands described in the said schedule, to the plaintiff, and no patents for said lands, or any of the same, have ever been issued.

Second. Even if the said lands had been subject to taxation, none of the same were assessed for taxation, and none of the said taxes pretended to be levied thereon by the said officers were levied in manner and form prescribed by the laws of this Territory, and such proceedings were irregular and in violation of the laws of this Territory, in the following particulars, among others, that is to say:

1. The county assessor did not personally inspect or examine any of the said parcels of land for the purpose of ascertaining the actual character, quality, or value of the same; but, on the contrary, he set down the same in the assessment roll delivered by him to the county clerk of said county, and on which assessment the said taxes were pretended to be levied, in an arbitrary manner, without any regard to the true or actual value thereof, whereby the said several parcels were unfairly, unequally, and unjustly assessed and taxed.

2. The said assessor did not take and subscribe an oath, and annex the same to the said assessment roll, as provided by section twelve (12), chapter twenty-eight (28), of the Political Code of this Territory.

3. The said several taxes pretended to be levied upon said property were unlawful in amount, and none of the same were levied in the time, manner, or form prescribed by the laws of this Territory.

4. The county clerk of said county has never made out a list containing said lands and showing the valuation thereof, and the
19 several species of taxes thereon, and the total taxes thereon, in manner and form as prescribed by section thirty-seven (37), of chapter twenty-eight, of the Political Code of this Territory; nor has the said county clerk ever delivered to the said county treasurer any duplicate list, showing the matters aforesaid, and being in manner and form as prescribed by the said last-mentioned section, and sections thirty-eight (38), thirty-nine (39), and forty (40), of the same chapter.

5. The county commissioners of said county have not attached to the said lists, if any were ever made out, their warrants under their hands and official seals, in general terms, requiring the county treasurer of the said county to collect the taxes specified in said lists according to law, as provided by section forty (40), aforesaid.

Wherefore the plaintiff prays the judgment of the court that the said pretended taxes are illegal and void, and that the same form no lien upon, or charge against, any of the said parcels of land; that the defendant and his deputies be perpetually restrained from selling, or offering for sale, any of said parcels of land; that a temporary order be issued restraining the defendant and his deputies from selling, or offering for sale, any of said lands, and that the plaintiff have such other relief as to the court may seem meet.

W. P. CLOUGH,
Attorney for Plaintiff.

STATE OF MINNESOTA, *County of Ramsey:*

R. M. Newport came before the undersigned this day, and having been first duly sworn, did depose and say: That he is general land agent of the plaintiff in the above-entitled action; that he has read the foregoing complaint, and knows the contents thereof; that as such agent and employee of the plaintiff, he is entrusted with the care and management of the lands within the Territory of Dakota and elsewhere, in which the plaintiff has acquired an interest under the several acts of Congress mentioned in the said complaint, including all the lands described in the schedule annexed to said complaint; that all the matters stated in the complaint are true of deponent's knowledge, save the matters alleged in paragraph 2, of subdivision 5, thereof; that the lands in said schedule mentioned have been assessed for taxation, and taxes have been attempted to be levied on the same, as in the said complaint stated; that the Government of the United States has expended large sums of money since the passage of the said act of Congress of July 15, 1870, in surveying the lands granted, and intended to be granted, by the said acts of Congress of July 2, 1864, including the lands specified in said schedule, amounting in all to more than one hundred thousand dollars, which expenditures remain unpaid; that, in consequence thereof, the said Government claims a lien on all said lands, including the lands mentioned in said schedule, for the amount of such expenditures, and it refuses to patent, and never has patented, any of the same to the said plaintiff, nor to any other person.

R. M. NEWPORT,
General Land Agent, Northern Pacific R. R. Co.

Subscribed and sworn to before me, on this thirtieth day of September, A. D. 1881.

[SEAL.] OTTO KUEFFNER,
Notary Public.

Subdivision.	*Section.*	*Town.*	*Range.*
S. W.¼ S. W.¼	31	144	49
S.½ S. E.¼	19	145	49
N.½ N. W.¼	3	146	49
Lots 3, 4, 6, 7,	11	146	49
W.½ N. W. S. E. S. E.	21	147	49
W.½ N. W. W.½ S. W.	19	145	50
N. W. S. W. 9	9	145	50
N. W. S. W. section 3 E.½ N. W.	13	145	51
N.½ section 3 W.½ S. W.¼	23	146	51
All section 19 & S. E.¼	27	147	51
S.½ section 3 N. W.¼ section 25		147	52
S. W.¼	33	148	52
E.½ N. E. E.½ S. E.¼	5	144	53
W.½ N. W. W.½ S. W.¼ E.½ N. E.¼ E.½ S. E.¼	9	144	53
E.½	31	144	53
E.½ N. E.¼ E.½ S. E.¼	7	147	53

	Subdivision.	*Section.*	*Town.*	*Range.*
	S. E. N. W. N. E. S. W. W.^{2} S. E.	27	147	53
	N. W.^{4}	31	148	53
	W.^{2}	23	146	54
	All section 5 and	35	147	54
	N. E.^{4}	31	148	54
	All sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and	35	144	55
	All sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and	35	145	55
	All sections 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 27, 29, 31, 33, and	35	146	55
	S.^{2} section 1, all sections 3, 5, 7, 9, 11, 17, 19, 21, 27, 29, 31, and	33	147	55
	All sections 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and	35	148	55
22	All sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and	35	144	56
	All sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and	35	145	56
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	All sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and	35	147	56
	S.^{2} sections 7, 9, 11, all sections 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and	35	148	56
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	All sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and	35	145	57
	All sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and	35	146	57
	All sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and	35	147	57
	All sections 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and	35	148	57
	All sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, and W.^{2} and S. E.^{4} 23, all sections 25, 27, 29, 31, 33, and	35	144	58
23	All section 1, S. E.^{4} and E.^{2} N. E.^{4} 3, all sections 5, 7, 9, 11, 13, N. E.^{4} section 15, all sections 17, 19, 21, S.^{2} 23, W.^{2} and S. E.^{4} sections 25, 27, 29, all sections 31, 33, and	35	145	58
	W.^{2} 1, all sections 3, 5, 7, 9, 11, S.^{2} N. E.^{4} of 13, all sections 15, 17, 19, 21, N. W.^{4} N. E. S. W. and W.^{2} S. W. 23, all sections 25, 27, 29, 31, 33, and S.^{2} and N. E.^{4} and E.^{2} N. W. and S. W. S. W.	35	146	58

Subdivision.	*Section.*	*Town.*	*Range.*
All sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and	35	147	58
S.^{2} sections 7, 9, 11, all sections 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and	35	148	58
All sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and	35	144	59
All sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and	35	145	59
All sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and	35	146	59
All sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and	35	147	59
All sections 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and	35	148	59

24 NOTE.—In the foregoing list of lands the characters—

E.^{2} stands for "east half."
W.^{2} stands for "west half."
N.^{2} stands for "north half."
S.^{2} stands for "south half."
N. E.^{4} stands for "northeast quarter."
S. E.^{4} stands for "southeast quarter."
N.W.^{4} stands for "northwest quarter."
S. W.^{4} stands for "southwest quarter."

(NOTE.—The following answer, served in a suit to restrain collection of the taxes levied in same county for the year 1879, was, by mutual consent of the parties, considered and treated as the answer in this case also.)

TERRITORY OF DAKOTA:

District Court for Cass County.

THE NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
against
IVER L. ROCKNE, as County Treasurer of Traill County, Territory of Dakota; PETER HERBRANDSON, INGBRET LARSON, and ROBERT RAY, as the Board of County Commissioners of Traill County, Territory of Dakota, and Traill County, Defendants.

Now come the above-named defendants, by H. F. Miller, their attorney, and, answering to the amended complaint of the plaintiff herein, deny each and every allegation, matter, or thing therein contained, except as hereinafter specifically admitted or qualified.

25 The defendants admit the first, second, third, fifth, and sixth paragraphs of said complaint, and so much of the seventh paragraph thereof as alleges that said lands were surveyed by the United States at great cost; and as to the fact that said costs have not been paid by said plaintiff, and that no patent for any of the lands described in Exhibits A and B of said complaint has been is-

sued to the plaintiff, or to any one else, these defendants allege that they have neither knowledge or information sufficient to form a belief as to the truth thereof, and therefore deny the same.

And these defendants, answering to the fourth paragraph of said complaint, allege that they have neither knowledge or information sufficient to prove a belief as to the truth thereof, and therefore deny the same.

And these defendants, further answering to the eighth, ninth, tenth, eleventh, twelfth, and thirteenth allegations of said complaint, allege that the Legislature of the Territory of Utah did pass an act, entitled "An act to legalize the assessment of Traill county, D. T., for the years 1879 and 1880," which act was approved March 1, 1881, and also a second act, entitled "An act to legalize the assessment of property for taxation in Traill county for the years 1879 and 1880," which act was approved February 17, 1881.

And these defendants, further answering said complaint, admit the fourteenth and fifteenth allegations of said complaint.

H. F. MILLER,
Defendants' Attorney.

26 TERRITORY OF DAKOTA, } ss:
County of Cass, }

H. F. Miller, being duly sworn, deposes and says: That he is the attorney of the defendants in the above-entitled action; that he is acquainted with the contents of the foregoing answer, and that the same is true of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true; that the reason this verification is not made by any of the defendants herein is that none of them are within the county where this deponent resides; that his knowledge of the facts therein stated are derived from a reading of the acts therein referred to.

H. F. MILLER.

Subscribed and sworn before me, this twenty-seventh day September, 1881.

[SEAL.]

C. C. SCHUYLER,
Notary Public, Cass Co., D. T.

Due service of the within admitted this twenty-ninth day of September, 1881.

THOMAS & BENTON,
Plaintiff's Attorney.

Filed April 27, 1882.

T. W. AMES,
Clerk District Court, Traill County, D. T.

27 *Judge's Certificate.*

TERRITORY OF DAKOTA, *County of Traill:*

In District Court, Third Judicial District.

THE NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
against
IVER L. ROCKE, County Treasurer of Traill County, Defendant.

I, Sanford A. Hudson, judge of the third judicial district of Dakota Territory, do hereby certify the foregoing to be a true copy of the judgment entered in the above entitled action; and I
28 further certify that the foregoing papers hereto constitute the judgment roll in said action.

Dated September 25th, 1882.

S. A. HUDSON, *Judge.*

29 TERRITORY OF DAKOTA, *County of Traill:*

Third Judicial District.

I, F. W. Ames, clerk of the district court within and for the said county of Traill, in the third judicial district of the Territory of Dakota, do hereby certify that the above and foregoing is a full, true, correct, and complete transcript and copy of the notice of appeal, and proof of service thereof, of the judgment roll and of the certificate of the judge, in the above-entitled action, wherein the Northern Pacific Railroad Company is plaintiff, and Iver L. Rocke, county treasurer of Traill county, is defendant, as the same now
30 remaining of record in the said court.

In witness whereof, I have hereunto set my hand, and affixed the seal of said court, this 25th day of September, A. D. 1882.

[SEAL.] F. W. AMES, *Clerk.*

31 U. S. Supreme Court, Dakota Territory. October Term, A. D. 1882—10 day of Term.

FRIDAY, *October 13th*, 1882.

Court met at 9 o'clock a. m., pursuant to adjournment.

Present: The Hons. A. J. Edgerton, chief justice; G. C. Moody, I. P. Ridder, S. A. Hudson, ass'tes judges; and the officers of said court.

Court being duly opened, the following proceedings were had, to wit:

THE NORTHERN PACIFIC RAILROAD COMPANY, Appellants,
vs.
IVER L. ROCKNEY, Treasurer of Traill County, Respondent. } No. 129.

Appeal from the District Court of Traill County.

And now, this 13th day of October, 1882, the above-entitled action issuing on for argument and hearing, in its regular order on the

calendar, W. P. Clough, Esq., attorney for Northern Pacific
32 Railroad Co., appearing for said appellants, and W. W. Green, Esq., contra.

And thereupon cause submitted to the court.

33 U. S. Supreme Court, Territory of Dakota. May Term, A. D. 1884—8th day of Term.

WEDNESDAY, *May* 21*st*, 1884.

Court met at the court-room pursuant to adjournment.

Present: The Hons. A. J. Edgerton, chief ju.; S. A. Hudson, Wm. E. Church, C. S. Palmer, ass'tes judges; and the officers of the court.

Court being duly opened, the following proceedings were had, to wit:

NORTHERN PACIFIC RAILROAD COMP'Y, Pl'ff & Appellant,
vs.
IVER L. ROCKNEY, County Treasurer of Traill County, Def't & Respondent. } No. 129.

Appeal from the Dist. Court of Traill County.

And now, this 21st day of May, A. D. 1884, the above entitled action coming on for argument on a rehearing of said cause,
34 W. P. Clough, Esq., appearing for said appellants, and Messrs. Miller and Green for said respondent, and thereupon cause submitted to the court.

35 U. S. Supreme Court, Territory of Dakota. May Term, A. D. 1884—10th day of Term.

FRIDAY, *May* 23*d*, 1884.

Court met at the court-room in the city of Yankton pursuant to adjournment.

Present: The Hons. A. J. Edgerton, chief ju.; S. A. Hudson, W. E. Church, C. S. Palmer, ass'es judges; and the officers of said court.

Court being duly opened, the following proceeding-were had, to wit:

NORTHERN PACIFIC RAILROAD COMPANY, Pl'ff, Appellant,
vs.
IVER L. BOCKNEY, County Treasurer of Traill County, Defendant, Resp't. } No. 129.

Appeal from the District Court of Traill County.

This action coming on to be heard at the May, A. D. 1884, term of said supreme court, at the supreme court-room in the city
36 of Yankton, D. T.—

The appeal herein having been argued by W. P. Clough, Esq., for the appellant, and by Messrs. Miller and Green for the respondent, and the court having advised thereon, is now here con-

sidered, ordered, and adjudged, that the judgment of said district court within and for said Traill county, appealed from, herein be, and the same is hereby, affirmed. And it is further ordered that this cause be, and it is hereby, remanded to the district court for further proceedings, according to law and the judgment of this court. And it is further considered and adjudged that respondent have, and recover of the appellant his costs and disbursements on this appeal expended, taxed, and allowed at fifty-three dollars.

By the court: A. J. EDGERTON,
Chief Justice Sup. Court, D. T.

37 *Appeal.*

TERRITORY OF DAKOTA:

In the Supreme Court.

NORTHERN PACIFIC RAILROAD COMPANY, Appellant,
vs.
IVER L. ROCKNE, County Treasurer of Traill County, Respondent.

To the Honorable Alfred J. Edgerton, chief justice of the said court:

Your petitioner, the Northern Pacific Railroad Company, respectfully showeth:

That the above entitled suit was originally brought in the district court of this Territory for the county of Traill.

That the object of the said suit was to restrain the respondent herein, Iver L. Rockne, county treasurer of the said county, from selling at public sale, to enforce the payment of certain alleged taxes against the same, a large number of tracts of land, the property of this defendant; the amount of the said alleged taxes being more than the sum of two thousand dollars, and the value of the said lands being more than one hundred thousand dollars, as well at the time of the commencement of this suit as ever since, and at the present time.

That issue having been joined in said action, the same was tried by the said district court, and judgment therein rendered against this petitioner, dismissing the said suit.

That from the judgment so rendered by the said district court this petitioner, shortly after the rendition thereof, appealed to the said supreme court.

That afterward, and at the October term of the said supreme court, held in the year 1882, the said appeal having come on for argument was duly argued and submitted, but the judges of the said supreme court having been equally divided in opinion, no determina-
38 tion of the said appeal was reached at said term; and afterwards a reargu-ment of the said appeal was directed by the said court, and the same was accordingly reargued at the term thereof held in May of the present year.

That at the said May term the said appeal was again reargued by counsel for the respective parties, and the judges of the said supreme

court having again been equally divided in opinion, judgment was entered by the said supreme court in the said suit, affirming the judgment of the said district court.

And your petitioner further alleges that the said judgment of the said supreme court, affirming the said judgment of the said district court was, in all things erroneous and contrary to equity and justice.

Wherefore your petitioner prays to be allowed an appeal, and hereby appeals to the Supreme Court of the United States from the said judgment, in accordance with the statutes of the United States for such case made and provided.

W. P. CLOUGH,
Att'y for Petitioner, Northern Pacific Railroad Company.

STATE OF MINNESOTA, } ss:
Ramsey County, }

Personally came before the undersigned W. P. Clough, the attorney for the petitioner in the foregoing petition, who, having been by me first duly sworn, did depose and say that the facts stated in the foregoing petition are true to the best of his knowledge and belief.

W. P. CLOUGH.

Sworn and subscribed to before me, on this 6th day of September, A. D. 1884.

39 [Endorsed:] Territory of Dakota. In the supreme court. Northern Pacific R. R. Co., appellant, *vs.* Iver L. Rockne, Co. Treas'r Traill Co., respondent. Appeal. The within appeal allowed this Sep. 11, 1884. A. J. Edgerton, chief justice supreme court of Dakota. Filed Sept. 11th, 1884. B. S. Williams, clerk.

40 TERRITORY OF DAKOTA, } ss:
County of Cass, }

A. B. Urion, being duly sworn, says: That at Fargo, in the Territory of Dakota, on the 2nd day of July, 1884, he served the annexed notice and statement of costs upon the appellant, The Northern Pacific Railroad Company, by depositing in the post office at Fargo, D. T., a true copy thereof, securely sealed in an envelop directed to W. P. Clough, Esq., St. Paul, Minnesota, the attorney for appellant. That the postage*nt* thereon was fully prepaid by sufficient number of stamps on said envelope; and that a regular daily rail route exists and extends between the said city of Fargo and the city of St.
41 Paul, Minnesota, where appellant's said attorney resides.

ALFRED R. URION.

Subscribed and sworn to before me, this 2nd day of July, A. D. 1846.

[SEAL.] ARTHUR A. MILLER,
Notary Public.

42 *Notice of Taxation of Costs.*

In Supreme Court, Territory of Dakota.

NORTHERN PACIFIC RAILROAD COMPANY
vs.
IVER L. ROCKNE, as Treasurer of Traill County, *et al.*

Statement of Costs and Disbursements.

Clerk's fees	$12
Brief	21
Statutory costs before agreement	5
" on agreement	15
Total	$53

TERRITORY OF DAKOTA, } *ss:*
County of Cass, }

H. F. Miller, being first duly sworn, says: That he is one of
43 the attorneys for the defendant and respondent in the above-entitled action, and that the above bills and items of costs and disbursements therein are just and correct, and have been, or will be, necessarily made and incurred in this action, to the best of deponent's information and belief.

H. F. MILLER.

Subscribed and sworn to before me, this 2nd day of July, A. D. 1884.

[SEAL.] ARTHUR A. MILLER,
Notary Public, Cass Co., D. T.

44 In Supreme Court, Territory of Dakota.

NORTHERN PACIFIC RAILROAD COMPANY
vs.
IVER L. ROCKNE, as Treasurer of Traill County, *et al.*

You will please to take notice that, on the 12th day of July, 1884, at 10 o'clock in the forenoon, application will be made to B. S. Williams, Esq., clerk of said court, at his office, in the city of Yankton, and Territory of Dakota, to have the foregoing bill of costs and disbursements taxed, adjusted, and inserted in the judgment
45 then and there to be entered herein.

Dated July 2nd, A. D. 1864.

Yours respectfully, H. F. MILLER,
Att'y for Def. & Resp., Fargo, D. T.

To W. P. CLOUGH, Esq'r,
Att'y for Plaintiff & App'll't, St. Paul, Minn.

46 [Endorsed:] Supreme Court, Territory of Dakota. Northern Pacific Railroad Company *against* Iver L. Rockne, as

Treas'r of Traill Co., *et al.* Notice of taxation of costs. Miller & Green, att'ys for def't & resp't. The within bill of costs taxed and allowed, this 12th day of July, 1884. B. S. Williams, clerk.

Bond on Appeal.

47 TERRITORY OF DAKOTA:

In the Supreme Court.

NORTHERN PACIFIC RAILROAD COMPANY, Appellant,

vs.

IVER L. ROCKNE, County Treasurer of Traill County, Respondent.

Know all men by these presents, that we, W. P. Clough and Francis McNamara, sureties of the Northern Pacific Railroad Company, are held and firmly bound unto Iver L. Rockne, county treasurer of Traill county, the respondent above named, in the penal sum of one thousand dollars, lawful money of the United States, for the payment whereof, well and truly to be made, we hereby
48 bind ourselves and our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated on the (4th) fourth day of September, A. D. 1884.

Whereas the said Northern Pacific Railroad Company has appealed to the Supreme Court of the United States from the judgment of the supreme court of the Territory of Dakota, in the above-entitled suit, affirming the judgment of the district court in the said suit:

Now, therefore, if the said Northern Pacific Railroad Company shall prosecute its appeal to effect and answer all costs that
49 may be adjudged against it in such case, the foregoing obligation to be void, but otherwise to remain in full force and effect.

W. P. CLOUGH. [SEAL.]
F. McNAMARA. [SEAL.]

STATE OF MINNESOTA, *Ramsey County,* } *ss:*

Personally came before the undersigned W. P. Clough and Francis McNamara, the same persons who executed the foregoing instrument, and each of them having been first duly sworn, did depose that he is worth the sum of one thousand dollars above debts, liabilities, and property exempt from levy and sale under execution.

W. P. CLOUGH,
F. McNAMARA.

Subscribed and sworn to before me, on this 6th day of September, A. D. 1884.

50 [Endorsed:] Territory of Dakota. In the supreme court. Northern Pacific Railroad Co., appellant, *vs.* Iver L. Rockne,

Co. treasurer Traill Co., respondent. Bond on appeal. The within bond approved, this Sept. 11, 1884. A. J. Edgerton, chief justice supreme court of Dakota. Filed Sept. 11, 1884. B. S. Williams, clerk.

51 UNITED STATES OF AMERICA, } ss:
Territory of Dakota, }

I, B. S. Williams, clerk of the supreme court of the Territory of Dakota, do hereby certify that the writings annexed to this certificate are true copies of their respective originals on file and remaining of record in my office, and that they constitute a full, true, and correct and complete transcript and copy of the record in the foregoing cause as the same now remains of record in my said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of Yankton, in the Territory
52 of Dakota, this twenty-fourth day of September, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the said United States the one hundred and ninth.

B. S. WILLIAMS, *Clerk.*

Endorsed on cover: Dakota Territory, supreme court. No. 1075. The Northern Pacific Railroad Company, appellant, *vs.* Iver L. Rockne, county treasurer of Traill county. Filed 14th October, 1884.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

(No. 1,075.)

NORTHERN PACIFIC RAILROAD COMPANY, *Appellant*,

agst.

IVER L. ROCKNE, COUNTY TREASURER OF TRAILL COUNTY, DAKOTA TERRITORY, *Respondent*.

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

This is an appeal from a decree of the supreme court of Dakota territory, affirming, by an equally divided bench, the final decree of the district court of that territory, for Traill county, dismissing a bill of complaint exhibited thereto by the Northern Pacific Railroad Company against the county treasurer of that county, to restrain the sale for taxes levied under territorial laws, of certain lands in that county which had been granted to that company to aid the construction of its railroad.

A single question arises on this appeal:

Had the lands mentioned become part of the taxable property within the territory when the disputed taxes were levied?

No other question was submitted to the court below.

By the company it is contended that the lands have not yet become subject to taxation under territorial laws, because patents therefor are withheld by the government from non-payment of the cost of surveying, selecting, and conveying the same.

The company claims the *status* of the lands to have been conclusively settled by the cases, *Prescott* v. *Railway Co.* 16 Wall. 603, and *Railway Company* v. *McShane*, 22 Wall. 444.

On the other hand, the officials of the territory deny the validity of the act of congress in pursuance of whose express commands the patents are being withheld; and hence, also, the relevancy of the cases cited.

The legislation pertinent to the subject is as follows:

By act of congress, approved July 2, A. D. 1864, entitled "*An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound, on the Pacific coast, by the northern route,*" the following enactments were made:

"Sec. 3. *And be it further enacted*, that there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commisioner of the general land-office; and whenever, prior to said time,

any of said sections, or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: *provided*, that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *provided further*, that the railroad company receiving the previous grant of land may assign their interest to said 'Northern Pacific Railroad Company,' or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act: *provided further*, that all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road may be selected as above provided; *and provided further*, that the word 'mineral,' where it occurs in this act, shall not be held to include iron or coal; *and provided further*, that no money shall be drawn from the treasury of the United States to aid in the construction of said 'Northern Pacific Railroad.'

"Sec. 4. *And be it further enacted*, that whenever said 'Northern Pacific Railroad Company' shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the president of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the president of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road; and from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the president of the United States, then patents shall be issued to said company, conveying the additional sections of

land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid: *provided*, that not more than ten sections of land per mile, as said road shall be completed, shall be conveyed to said company, for all that part of said railroad lying east of the western boundary of the state of Minnesota, until the whole of said railroad shall be finished and in good running order, as a first-class railroad, from the place of beginning on Lake Superior to the western boundary of Minnesota: *provided, also*, that lands shall not be granted under the provisions of this act on account of any railroad, or part thereof, constructed at the date of the passage of this act.

"Sec. 6. *And be it further enacted*, that the president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company; and the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale."

13 U. S. St. at Large, pp. 367–369.

The statute, in compliance with which the interior department declines to make patents to the company for the lands taxed, is contained in an act of congress approved July 15, 1870, entitled "*An act making appropriations for sundry civil expenses of the government for the year ending June 30, 1871, and for other purposes*," and is as follows:

"For the survey of the public lands within the limits of the land grant to the Northern Pacific Railroad Company in a direct line extending from Du Luth, on Lake Superior, to Georgetown, on the Red River of the North, ninety-five thou-

sand nine hundred and eighty dollars: *provided*, that five thousand dollars of this appropriation shall be expended for office work by the surveyor general of Minnesota: *and provided further, that before any land granted to said company by the United States shall be conveyed to any party entitled thereto under any of the acts incorporating or relating to said company, there shall first be paid into the treasury of the United States the cost of surveying, selecting, and conveying the same, by the said company or party in interest.*"

16 U. S. St. at Large, pp. 305–306.

This enactment was in the line of an apparent policy, inaugurated by congress in the year 1862, that grantees of public lands should themselves bear the expense of identifying and transferring the same.

This principle was, in the year last mentioned, applied to private land claimants; 12 U. S. St. at Large, p. 409, § 3; in the year 1864 to the Union Pacific and other railroads named in the Pacific Railroad act of 1862; 13 U. S. St. at Large, p. 365, § 21; and in the year 1876 to railroad companies holding direct grants of lands from the government generally. 19 U. S. St. at Large, p. 121.

The following extracts from the findings of the district court state the facts touching the character of the lands, the location and construction of the railroad, the levy of the disputed taxes, and the threatened sale of the lands therefor:

"*Third*—That under and in pursuance of said several acts and resolutions of congress the plaintiff has built and caused to be built and put in operation a continuous line of railroad and telegraph, extending from the waters of Lake Superior, at Duluth, in the state of Minnesota, westerly across the said state and across the territory of Dakota, to and beyond the Missouri river, and of the character and materials specified in the said acts; and everything has been done by the said railroad company required by the terms of the grant, to enable the said company to acquire a complete and perfect title to the lands in controversy in this action, except as respects the payment of the costs of survey, etc., required by

the act of July 15, 1870, above mentioned. All that part of the said railroad within the territory of Dakota has been located and built since July 15, 1870. The government of the United States, since the passage of the said act of congress of July 15, 1870, has caused the lands described in the complaint to be surveyed at its own expense, no part of which has ever been repaid it by said company. The patents for the said lands described in the complaint, or any of them, have never been issued to the said railroad company, or to any person for said company, and the government refuses to issue said patents until the payment for survey and selecting the said lands, as above mentioned, and required by said law of 1870, has been made."

"*Fourth*—That the lands mentioned and described in the schedule annexed to the plaintiff's complaint, and made a part thereof, were, at the time said acts were passed and the said railroad located through the territory of Dakota, a part of the public domain of the United States, and not any part of the right of way mentioned in said act, and have never been sold, reserved, granted, or otherwise appropriated, except as above mentioned, and were free of pre-emption and other rights, and were situated within a distance of 40 miles of the line of the plaintiff's said railroad."

"*Fifth*—That in the year 1880 the officers of the said county of Traill, authorized by the laws of this territory to assess property therein for the purposes of taxation and to levy taxes therein, assessed and levied taxes upon said land for that year, amounting in the aggregate to about the sum of two thousand dollars, all of which remain unpaid, and which the plaintiff refused and still refuses to pay; and the defendant, Iver L. Rockne, who is county treasurer of said county of Traill, did advertise and give public notice that on a certain day and place, to-wit, on the first Monday in October, 1881, he would sell the said lands according to law for the non-payment of the said taxes, and for the collection of the same."

See Printed Record, pp. 2-6.

The following further extracts from the same findings show the grounds upon which the district court proceeded in disallowing the company's claim that the lands had not yet become taxable:

"*First*—That the said plaintiff, the Northern Pacific Railroad Company, by its charter and the grant of lands from the government, acquired an equitable title in fee to the lands mentioned and described in the complaint in this action, which, on the performance on the part of the said company of all the conditions subsequent required by said grant to be performed, became a complete equitable title; said company having earned the lands, nothing remained but the issuing of the patents.

"*Second*—That, the equitable title to the said lands having been fully vested in the said plaintiff, and having ceased to belong to the United States, they were liable to taxation for the year 1880, as other lands in said county, for the objects for which the said taxes were levied.

"*Third*—That the act of congress of July 15, 1870, requiring the said railroad company to pay the cost of surveying, selecting, and conveying the said lands granted to it by the act of July 2, 1864, as a condition precedent to its right to a patent, was inoperative and void, and furnished no legal ground for the refusal by the United States to grant the patent, and could not be set up as a reason for the exemption of said lands from taxation by said plaintiff.

"*Fourth*—That the said plaintiff has no standing in a court of equity in asking for the restraining order of said court to prevent the collection of these taxes, and shows no equitable right to such relief by alleging that these lands are not taxable in consequence of the non-performance by said plaintiff of an obligation imposed upon it by law, and giving no good reason why it has not been performed."

See Printed Record, pp. 2-6.

Those portions of the statutes of Dakota territory relating to the sales of lands for taxes material for elucidating the question before the court are as follows:

"Sec. 60. Whenever, in the collection of any district, town, city, or local tax, which may have been levied according to law, the collector is not able to make the tax by distress and sale of personal property, and real estate is to be sold for the same, it shall be the duty of the collector of the tax to send such delinquent list to the county treasurer on or before the fifteenth day of July of each year; and the county treasurer shall receive the delinquent list, and advertise the

same at the same time he advertises the sale of real estate for delinquent taxes, as hereinafter provided, by adding the amount of such delinquent district, town, city, or local tax to the amount of delinquent territorial, county, and other taxes, and shall sell such lands for the pupose of paying all such delinquent taxes, as hereinafter directed, and shall credit the proper district, town, city, or locality for the amount of taxes so collected, which shall be subject to the order of the proper collecting officer.

"Sec. 61. The treasurer shall give notice of the sale of real property, by publication thereof once a week for three consecutive weeks, commencing the first week in August preceding the sale, in a newspaper in his county, if there be one, and if there be no paper published in his county, shall give notice by a written or printed notice posted on the door of the court-house or building in which courts are commonly held, or the usual place of meeting of the county commissioners, for three weeks previous to the sale. Such notice shall contain a notification that all lands on which the taxes of the preceding year (naming it) remain unpaid will be sold, and the time and place of the sale; and said notice must contain a list of the lands to be sold, and the amount of taxes due. The treasurer shall add to each description of land so advertised the sum of ten cents for each description, other than town lot, and for each town lot the sum of five cents, to defray the expenses of advertising, which amount shall be paid by the county treasurer at the expiration of the sale, upon the affidavit of the publisher.

"Sec. 62. That on the first Monday of September in each year, between the hours of nine o'clock A. M., and four o'clock P. M., the treasurer is directed to offer at public sale, at the court-house, or at place of holding courts in his county, or at the treasurer's office, where, by law, the taxes are made payable, all lands, town lots, or other real property, which shall be liable for taxes of any description for the preceding year or years, and which shall remain due and unpaid; and he may adjourn the sale from day to day, until all the lands, lots, or other real property have been offered, and no taxable property shall be exempt from levy and sale for taxes.

"Sec. 63. The person who offers to pay the amount due on any parcel of land for the smallest portion of the same, is to be considered the highest bidder; and when such a portion constitutes a half or more of the parcel, it is to be taken from the east side thereof, dividing it by a line running north

and south, except that town lots are to be divided, in such case, lengthwise by a parallel with the proper lines of the lots. If the portion taken be less than one-half of the parcel, it is to be taken from the south-east corner, in a square form as nearly as the form of the land will conveniently permit. The preceding provisions of this section are subject to the following qualifications: The homestead shall not be sold for any taxes due from the owner thereof, until all other land, town lots, or other real property shall have been first sold; and to that end the quantity of land offered for sale may be obtained by drawing the division line in any direction so as to avoid the homestead; and when the homestead constitutes a part of the tract or parcel sold, and is not yet ascertained, the court may, in the action hereafter authorized, at the suggestion of either party, cause proceedings to be had similar to that required in relation to mechanic's lien, for the ascertainment of the homestead. And, in all other cases of such sales, it may take the requisite order and proceedings to ascertain the land sold, and to set apart from the homestead.

"Sec. 67. The purchaser of any tract of land, sold by the county treasurer for taxes, will be entitled to a certificate in writing describing the land so purchased, the sum paid, and the time when the purchaser will be entitled to a deed, which certificate shall be assignable, and said assignment must be acknowledged before some officer having power to take acknowledgment of deeds. Such certificate shall be signed by the treasurer in his official capacity, and shall be presumptive evidence of the regularity of all prior proceedings. The purchaser acquires the lien of the tax on the land, and, if he subsequently pay any taxes levied on the same, whether levied for any year or years previous or subsequent to such sale, he shall have the same lien for them, and may add them to the amount paid by him in the purchase, and the treasurer shall make out a tax receipt and duplicate for the taxes on the real estate mentioned in such certificate, the same as in other cases, and shall write thereon, 'Sold for tax at public sale.' Such certificate shall be substantially in the following form:

"COUNTY TREASURER'S CERTIFICATE OF TAX SALE.

"*The Territory of Dakota,* }
——— County, } *ss.*

"I, ———, treasurer of the county of ———, in the territory of Dakota, do hereby certify that the following-described real estate in said county and territory, to-wit: [describing the same,] was,

on the ——— day of ———, 18—, duly sold by me, in the manner provided by law, for the delinquent taxes of the year 18— thereon, amounting to ——— dollars, including interest and penalty thereon, and the costs allowed by law, to ———, for the sum of ——— dollars, he being the highest and best bidder for the same.

"And I further certify that, unless redemption is made of real estate in the manner provided by law, the said ———, or assigns, will be entitled to a deed therefor on and after the ——— day of ———, A. D. 18—, on surrender of this certificate.

"In witness whereof, I have hereunto set my hand, this ——— day of ———, A. D. 18—.

———,
Treasurer.

"Sec. 70. The owner or occupant of any land sold for taxes, or any other person, may redeem the same at any time within two years after the day of such sale, or at any time before the execution of a deed of conveyance therefor by the county treasurer, by paying the county treasurer, for the use of the purchaser, his heirs or assigns, the sum mentioned in this certificate, and interest thereon at the rate of thirty (30) per cent. per annum from the date of purchase, together with all other taxes subsequently paid, whether for any year or years previous or subsequent to said sale, and interest thereon at the same rate from the date of such payment; and the treasurer shall enter a memorandum of the redemption in the list of sales, and give a receipt therefor to the person redeeming the same, and file a duplicate of the same with the county clerk as in other cases, and hold the money paid to the order of the purchaser, his agent or attorney: *provided*, that infants, idiots, and insane persons may redeem any lands belonging to them, sold for taxes, within one year after the expiration of such disability.

"Sec. 73. If no person shall redeem such lands within two years, at any time after the expiration thereof, and on production of the certificate of purchase, the treasurer of the county in which the sale of such lands took place shall execute to the purchaser, his heirs or assigns, in the name of the territory, a deed of the land remaining unredeemed, *which shall vest in the grantee an absolute estate in fee-simple in such land*, subject, however, to all the claims which the territory may have thereon for taxes or other liens or incumbrances."

See Revised Codes Dakota, 1877, pp. 115–119.

The appeal from the district court to the supreme court of the territory was first argued at the October term, 1882, of the last-named court, then consisting of four judges, includ-

ing the judge who had sat in the case in the district court. The judges, upon consultation, being equally divided in opinion, the case stood over for further argument; but, on account of various obstacles, was not reargued until the May term, 1883. In the mean time, one of the judges who had sat at the original argument had died, and another had retired, on expiration of his term of office, and their places had been filled by others. Upon the reargument the judges proved to be again equally divided in opinion; the two who had, upon the first argument, inclined towards affirmance, retaining the same impressions after reargument. These facts account for the absence of a written opinion from the court below.

POINTS AND AUTHORITIES.

The lands taxed had not become part of the taxable property within the territory when the taxes in dispute were levied, and the court below erred in not so deciding, and reversing the decree of the district court.

The truth of the above proposition is incapable of doubt, provided the rule announced in *Prescott* v. *Railway Co.* 16 Wall. 603, and again in *Railway Co.* v. *McShane*, 22 Wall. 444, governs this case. Those cases arose under the congressional acts of 1862 and 1864, relating to the family of railroads of which the Union Pacific is chief. The only differ-

ence between the material parts of those acts and the material parts of the acts relating to the Northern Pacific Railroad is the fact that the imposition of payment of surveying fees, as a condition precedent to the issuance of patents, was accomplished in the former by amendment to the original act making the grant, and in the latter by matter contained in a general law. The substantial identity of these provisions will appear by the following comparison:

N. P. Act, 1870.	U. P. Act, 1864.
That, before any land granted to said company by the United States shall be conveyed to any party entitled thereto under any of the acts incorporating or relating to said company, there shall first be paid into the treasury of the United States, the cost of surveying, selecting, and conveying the same, by the company or party in interest.	That, before any land granted by this act shall be conveyed to any company or party entitled thereto under this act, there shall first be paid into the treasury of the United States the cost of surveying, selecting, and conveying the same by the said company or party in interest, as the titles shall be required by said company.
16 U. S. St. at Large, pp. 305–306.	13 U. S. St. at Large, p. 365.

The substantial identity of the clauses making the grants will also appear by the following comparisons:

N. P. Act, 1864.	U. P. Act, 1862.
Sec. 3. That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per	Sec. 3. That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile, on each side of said railroad on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the

mile on each side of said railroad, whenever it passes through any state, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, etc.

* * * *

Sec. 4. That whenever said Northern Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the president of the United States shall appoint three commissioners to examine the same, and, if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the president of the United States, and patents of lands as aforesaid shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to and coterminous with said completed section of said road; and from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the president of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on, as fast as every twenty-five miles of said road is completed as aforesaid.

13 U. S. St. at Large, pp. 367–368.

line of said road is definitely fixed.

* * * *

Sec. 4. That whenever said company shall have completed forty consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated by this act, and supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture, and all other appurtenances of a first-class railroad,—the rails and all other iron used in the construction and equipment of said road to be American manufacture of the best quality,—the president of the United States shall appoint three commissioners to examine the same and report to him in relation thereto, and if it shall appear to him that forty consecutive miles of said railroad and telegraph line have been completed and equipped in all respects as required by this act, then, upon certificate of said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company on each side of the road as far as the same is completed, to the amount aforesaid; and patents shall in like manner issue as each forty miles of said railroad and telegraph line are completed, upon certificate of said commissioners.

12 U. S. St. at Large, p. 492.

As indicated by the above quotation from the findings of the district court, those who assert the taxability of the lands described in the company's bill of complaint, found their

opinions solely upon the proposition that so much of the act of Congress of July 15, 1870, as directed the withholding of conveyances to the company until surveying fees should be paid, was unconstitutional and void.

The line of argument by which that conclusion is reached is, shortly, this: By section 3 of the original act of incorporation a present grant was made to the company; by section 4 of the same act, congress promised to issue patents for the lands, whenever certain enumerated conditions should have been satisfied by the company. The payment of surveying fees was not one of these conditions; and, hence, the imposition of the payment of those fees violated the rights of the company, vested prior to the passage of the act imposing them, by the act making the grant of the lands.

If the territory cannot treat the imposition of the surveying expenses as invalid, it necessarily follows that the rule of *Prescott* v. *Railway Co.* and *Railway Co.* v. *McShane* has settled the *status* of these lands, and that they have not yet dropped into the body of taxable property within the territory.

Whether or not the act of 1870 is valid, presents a question of large import, both to the railroad company and the government. When it is considered that for the survey of, perhaps, less than one-thirteenth part of the belt of country embracing the Northern Pacific Company's grant, the appropriation of $85,000 was required, and that, in 1870, practically none of that belt had been surveyed, the magnitude of the question, measured by a merely pecuniary standard, is realized. If the cost of surveying and identifying the sections of land composing its grant has been constitutionally imposed upon the company, the government will be saved a very great sum of money; while the company, on the other hand, in order to obtain what the act of 1864 granted it, will be put to a vast expenditure, which that act omitted to require.

The only judicial exposition of this question, thus far, has occurred at the hands of the supreme court of the state of Minnesota. *County of Cass* v. *Morrison*, 28 Minn. 257. That case was as follows:

Morrison had purchased certain lands in Minnesota from the Northern Pacific Railroad Company, forming part of the grant to the company lying within that state. Taxes were levied upon them, under state authority, and proceedings were instituted to enforce the same by judgment against the lands and the sale thereof. Morrison defended, alleging that the lands had not yet become taxable, on account of the detention of the patents therefor by the interior department, in pursuance of the act of 1870. The court overruled this defense on the sole ground that the act of 1870 violated the vested rights of the company, and was void; and that the company, having satisfied all the conditions imposed by the acts of congress making the grant, held a complete and perfect right to patents for the lands then in controversy, without the doing of any further acts. A full copy of the opinion in that case is appended to this brief.

The first striking point about this case is the absence of both parties to the contract held to have been violated. To this absence is, no doubt, attributable the fact that the very able and very learned court, in dealing with the questions before it, inadvertently left out of view not only the total impotence of any local jurisdiction to defeat a liability to government specifically created by act of congress, but also, at least, two other of the most elementary principles of constitutional law; to-wit, *firstly*, that a legislative act, tending to violate a contract, can only be objected to by the injured party to the contract, *Hagar* v. *Rec. Dist.* 111 U. S. 701; and, *secondly*, that since every statute must be presumed to have been constitutionally enacted, until the contrary has been clearly shown, the presumption of legislative power to

grant a given statute includes the presumption of assent by all parties to be affected thereby, whenever such assent is requisite to the existence of such power. One of the most prominent of the cases controlled by these principles had been decided by that very court but a few terms previously. *Ames* v. *The L. S. & M. R. Co.* 21 Minn. 241.

The great financial values involved in that case occasioned its being one of the most exhaustively argued and carefully considered cases ever before that court. The facts were these:

In the year 1857, the legislature of Minnesota, then a territory, passed an act in which it was provided that *twenty-six* persons, named therein, and their associates, successors, and assigns, should be, and thereby were, constituted a body corporate and politic, by the name of the Nebraska & Lake Superior Railroad Company, with certain enumerated powers, including that to construct and operate a railroad over a certain route therein mentioned. Shortly after the passage of this act, and in the same year, *eighteen* of the grantees of these franchises accepted the same in writing, in a manner provided for by the act.

In the year 1858, Minnesota was admitted to the Union, with a constitution providing that "*no corporation shall be formed under special acts, except for municipal purposes.*"

In 1861, the legislature of the state of Minnesota passed an act, purporting to *amend* the said territorial act of 1857, whereby it was assumed to transfer the franchises conferred by the earlier act upon the twenty-six persons specified therein, to *seventeen* specified persons, but *three* of whom were of the original twenty-six, and whereby the name of the corporation was changed to that of the Lake Superior & Mississippi Railroad Company. There was no *evidence* in the case that the remaining twenty-three had ever assented to this legislative transfer of the franchises from themselves to the grantees in the amendatory act of 1861. The case was,

therefore, indisputably one where franchises vested by legislative act in *one* body of men, were transferred by a later act to *another* and *distinct* body, without any *evidence* that the former had assented. Shortly after the passage of the act of 1861, the seventeen persons therein named organized thereunder, and became a corporation, under the name of the Lake Superior & Mississippi Railroad Company; and that corporation had, before the case cited came before the Minnesota court, constructed, equipped, and put into operation a railroad extending from St. Paul to Lake Superior, 154 miles in length, at an expense of several millions of dollars.

The contest between Ames and the Lake Superior & Mississippi Company arose from the attempt of the latter to appropriate for its uses a parcel of ground, the property of Ames. The latter resisted, asserting the corporate incapacity, and, in fact, nonentity, of that company, on the ground of nullity of the act of the state legislature of 1861, upon which its existence depended.

This invalidity was alleged upon two grounds: *Firstly*, that as the act of 1861 vested the franchises in a body of men distinct from that one named in the original act, it, in effect, created a new corporation, and so contravened that provision of the state constitution forbidding the creation of corporations by special act; and, *secondly*, that as the act of 1861 took certain franchises from one set of grantees, and bestowed them upon another and different set, it contravened with that provision found both in the federal and state constitution, forbidding the passage of laws impairing the obligation of contracts.

It is obvious that if *either* of these objections to the act whence the Lake Superior & Mississippi Company derived its authority to appropriate private property was well taken, the company must have lost the case; for whatever may be the right of *de facto* corporations to transact *ordinary* business until the state interferes by *quo warranto*, private prop-

erty cannot be taken *in invitum*, without authority to do so being conferred by some valid law. At least, such was assumed to be the rule throughout the litigation referred to.

The case was argued twice before the state supreme court. Upon the first argument, the court decided the act invalid, upon the ground that it created a new corporation, in a mode prohibited by the state constitution. A rehearing was granted, upon which, in the language of the court's opinion, the argument "was conducted, on behalf of each party, with an ability and thoroughness seldom equaled." Upon reconsideration of the case, the court reversed its former decision, and held the act of 1861 valid. Of course, in so doing, it was compelled to negative *both* objections to the act; it had to hold both that the act did not create a new corporation, and that the transfer of franchises from one set of men to another, without any proven assent from the former, did not violate the contract with it, resulting from the original grant. The latter proposition was solved by the application of the principles above stated. It was done in the following terms:

"The main question is, was the act of 1861 unconstitutional?

"It is claimed that it was, because: *First*, if operative, it created a new corporation, and was, therefore, repugnant to s. 2, art. 10, of the constitution; *second*, that if it assumed merely to transfer the ownership of an existing corporation from those in whom such ownership was then vested, without their consent, to the persons named in the act, it was in violation of the provision, in both the federal and state constitutions, which prohibits the passing of any laws impairing the obligation of contracts."

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"The act of 1861 assumed to authorize the new corporation to organize and put in operating condition the then existing corporation. They have, assuming to act by that authority, and no other, perfected the organization. That the legislature might, with the consent of the old corporators, confer this authority upon the new, cannot be questioned. *The presumption is, that an act of the legislature is valid un-*

til the contrary appears; and, when the consent of certain persons is necessary to the validity of such act, the presumption of validity includes the presumption of such consent, unless, perhaps, in a proceeding to which such persons are parties, and in which they object that the act is invalid, because it invades their rights. If they are content to acquiesce in the action of the legislature, its act is valid, and cannot be questioned by strangers.

"Cooley's Const. Lims, 163.

"As it does not appear that the original corporators ever made any objection to the act in question, the plaintiffs are not in a position to raise it."

Pages 290–291.

These principles were as pertinent to the tax case as to that one in which they were announced. Assuming that the act of congress of July 2, 1864, guarantied to the Northern Pacific Company the right to acquire full title to the lands therein designated, upon satisfaction of the conditions therein specified, and that this act, and its acceptance, formed a contract which congress could not impair or alter, against the company's will; still, *there were no parties to that contract other than congress and the company.* The states and territories along the line of the Northern Pacific Railroad have never become parties to the contract for the acquisition by the company of the lands mentioned in its incorporating act. The time has not yet been, when the company has not been able to wholly release to the government its entire grant, save only such lands as it may have sold or contracted to sell. Much more has the company, at all times, been capable of assenting to any modifications of the conditions of its grant, without seeking the permission of any state or territory.

If, on July 15, 1870, the Northern Pacific Company had been of mind wholly to release to the government its land grant within the state of Minnesota, could that state have interfered to the slightest extent? Could it have put a legal

straw in the way of executing such an intention? Surely not. As a matter of fact, no part of the railroad had been built at that date; but it is impossible to see what right to interfere between congress and the company the entire completion of the road prior to that date would have conferred upon the state.

It is beyond dispute, therefore, that, at the date of the passage of the act of congress in question, that body had full authority to vary or increase the conditions upon which it had previously promised to patent lands to this company, with the assent of the latter.

Such being the case, and assuming that a state or territory can nullify an act of congress imposing a liability to the government, it was the duty of the Minnesota supreme court to hold, *firstly*, that no one save the Northern Pacific Railroad Company itself could be heard to complain of the act of 1870 as a breach of the contract with itself; *secondly*, that in any event congress was empowered to pass that act with the company's assent; and that, such assent being in its opinion necessary to the existence of the power, it was bound, as part of its duty of presuming the validity of all statutes, to presume the requisite assent by the company to this one.

Not the slightest evidence was before the court in that case of the company having ever refused to be bound by the act held invalid. It did appear that the company had not yet paid the costs of the surveys; but it also appeared that the act was being executed to the fullest extent on the part of the government by the rigorous withholding of all conveyances. If the statute was, as the court held it to be, as a matter of law, dead, the court was fully informed that as a matter of fact it possessed the fullest vitality. The fact that the surveying fees had not yet been paid, did not even show a default in the liability imposed upon the company by that act; for the act does not fix any date of payment. The act merely defines the order of precedency between two acts,

namely, the payment of the costs of survey, and the execution of conveyance. The former is to precede the latter; but the time of doing the first act in the established series was purposely left by congress to the convenience of the company.

But, the overlooking of the grave constitutional principle that states and territories are powerless to defeat the operation of an act of congress creating a liability in favor of the government, as well as of those other constitutional principles affirmed by one of its own well-considered judgments, was not the sole oversight of the learned Minnesota court in considering *Cass County* v. *Morrison*. The doctrine of *Prescott* v. *The Railway Co.*, and of *The Railway Co.* v. *McShane*, was totally misapprehended. The learned Minnesota court started with a complete misconception of the real question to be decided. The question which the court had in its mind there is stated in its opinion in the following terms: "The main question in the case is, *do these lands belong to the United States?*"

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Now, that was not the question discussed by this court in *Prescott* v. *The Railway Co.*, and in *The Railway Co.* v. *McShane*. It was not argued by this court, in those cases, that, after the railroad had been built, and all other conditions due from the company satisfied, save the payment of the costs of survey, the lands still "belonged" to the government. It was not asserted in those cases that without payment of the surveying fees no sort of title passed to the company. On the contrary, it was merely asserted that without payment of the surveying fees the title of the company is "*incomplete*."

22 Wall. 462.

This court has not said that the grantee, under such circumstances, has *no* title; but only, that his title is not a *complete* one.

It would be sigular if, where lands are granted to aid the construction of a railroad, and the road has been completed, no sort of title to the lands should thereupon vest in the grantee, merely because it has omitted to pay certain surveying expenses, which must be paid before patents for the lands can issue.

The estate in the lands which vests in the grantee under such circumstances is, manifestly, the full beneficial estate in the property, *minus* the interest which the government has declared its purpose to retain until after the surveying expenses have been paid. The extent of this retained interest becomes readily apparent upon comparison of the clause directing the detention of the patents, with those making the grant and imposing the body of the conditions.

The latter mentioned clauses pass the general beneficial title to the lands. Being grants *in præsenti*, they vest a general title to the property in the grantee at once, subject to later identification, and to perfection by the doing of the things forming the consideration for the grant. When the railroad has been built, and the remaining things forming the consideration of the grant have been done, the interest of the grantee cannot be very different from that of a purchaser of land who has paid all the price, and is delinquent only to the extent of the expense which has been incurred in setting off his purchase from a larger tract, and that of making the title papers. The estate of such a purchaser cannot, for most purposes, be very different from that of the complete legal and equitable title. Still, the grantor must be admitted to have rights recognized by the law, and of which no third party can rightfully deprive him. He withholds conveyance of the legal title to secure payment of the cost of setting bounds to the tract, and making the deed. If a third

party, the taxing authority, for instance, can intervene and levy a tax upon the property, and sell it to pay the tax, and give a deed conveying the full legal title, every need of a conveyance from the original vendor is supplied, and nobody has any further incentive to pay the costs of survey, or of a deed from such vendor. The tax deed takes the place of the vendor's deed, because it, of its own force, carries that legal title which, alone, the purchaser lacked to complete absolute ownership of the land.

The legislation of congress directing the withholding from railroad companies and other grantees of the public domain patents therefor, until the cost of surveying, selecting, and conveying the land shall have been paid, goes upon the theory that the possession of the legal title will be of sufficient convenience to the grantee to induce him to come forward *sometime* and make the payments requisite to put that title at his command. That legislation does not declare, in specific terms, that the amount of these costs shall rest upon the grantee as a legal obligation. It does not say that payment shall be made within any determinate period of time. It denounces no penalties for failure to make the payment, except the inconvenience of being without the legal title. In short, the only pressure which that legislation seeks to put upon the grantee is the inconvenience mentioned. This inconvenience forms the sole safeguard which the government has seen fit to retain for the repayment of these expenses. If, by the intervention of any third party, this inconvenience can be obviated, that sole safeguard can be demolished, and a patent from government ceases to possess utility. In framing this legislation congress took the shrewd practical view that, sooner or later, the want of a legal title to such lands would become a sufficient motive to the grantee, or his successors in interest, to procure that title at the comparatively trifling price which that body affixed thereto.

But, if somebody else, for instance the state of Minnesota, could supply the same commodity at a much less price, it would not be very hard to guess where the patronage of this kind would go.

The rule announced in *Prescott* v. *The Ry. Co.*, and in *Railway Co.* v. *McShane*, was not that all lands are taxable by local authorities save those which "belong" to the United States; *but that no land is taxable by such authorities so long as the legal title thereto is retained by the government as security for a payment which congress has required to be made.*

The real question, therefore, in the case of *Cass County* v. *Morrison* was not, as stated by the learned Minnesota court, whether the land "belonged" to the United States, *but merely whether the legal title thereto was then being retained by the government, in pursuance of an act of congress, as security for payments which that act required to be made.* It being confessed that the title was being so retained, it should have been held that the lands had not yet become part of the taxable property within the state.

Considering the way in which the question came before the learned courts of Dakota territory, by the case at bar, there was even less excuse for holding the lands subject to taxation than for the Minnesota court to hold those taxable which were concerned in *Cass County* v. *Morrison*. Leaving out of view the fact that the Dakota authorities had no jurisdiction to examine the validity of this imposition, *the Dakota courts, if they deemed the assent of the company essential to its validity, were bound to presume such assent. Furthermore, if, in their opinion, the taxability of these lands depended upon the validity of the act of 1870, since the only objection to its validity lay in a supposed violation of the contract rights of the Northern Pacific Railroad Company, they were bound to hold that no one save that company itself could interpose such an objection.*

These propositions were especially binding upon those learned courts in view of the fact that the very party whose contract rights were claimed to have been violated by the act of 1870 came into court founding its rights upon the operation of that very statute.

What instance can be cited where a party founding his claim upon a given statute has been denied it by a court, because of the objection by his adversary that the statute was void, as violating a legislative contract with the claimant himself?

Surely none, unless it be the very case at bar.

Whether or not congress would have been empowered, against the will of the company, to impose, as a condition for the issuance of patents, the payment of surveying fees by a general law, as late as July 15, 1870, will not here be discussed, for three reasons:

Firstly. No such case is made by this record. Such legislation must certainly have been within the authority of congress, if assented to by the company. There is no evidence that the company has not assented. Hence this court, under the rule that the presumption of the validity of legislation includes the presumption of every assent requisite to such validity, must infer the assent of the company if, in the opinion of the court, congress was powerless to make the imposition embodied in the act without such assent.

Secondly. No one can rase the objection that the act of 1870 is invalid, save the company itself. Such invalidity being based solely upon the supposed violation of the company's contract rights, none but itself can make complaint.

Hagar v. *Rec. Dist.* 111 U. S. 701.

THIRDLY, *and chiefly. It is immaterial, for any purpose of this case, whether the act of 1870 violated the contract rights of the railroad company or not.*

Even should it be assumed that the imposition of the costs of surveying was unauthorized; that the company has never assented to the imposition; and that, if some method could be found of bringing the government into court to litigate the question with it, the act would be held invalid; still it is impossible to see how the truth of those suppositions could establish the taxability of the lands. The proposition here contended for is simply this: *So long as the legal title to lands is actually retained by the government, in pursuance of an act of congress expressly requiring it to be done, as security for a payment of money to the government, such lands remain outside the body of property liable to taxation by a state or territory.*

This proposition seems too palpably true to need demonstration. If it were false, a *third party* might interpose between the government and the object of its laws and nullify them. The question whether or not the government, in creating a liability to itself, has done an act violating a prior engagement, or infringing any other constitutional right, is one to be determined exclusively between itself and the party made liable. No *third* person, power, or potentate can interfere, and, *in the absence of the government from the inquiry*, solve the question for itself adversely to the government, and thereby prevent the latter from realizing dues on demands which an act of congress has expressly created. If such a thing could be done in *one* case, what is to hinder its being done at pleasure?

If a state can, by proceedings to which the government is no party, hold an inquest upon the validity of a money demand made by congress, declare such demand null, and proceed to render nugatory the sole means devised by congress to insure payment, the federal government can no longer exist, except by the forbearance of the states. If such a thing could be done in respect of one species of money demand, why might it not be done in respect to any other species?

Why would not every lien imposed upon property by the government to secure the payment of a demand, or the performance of a duty, be subject to inspection, and capable of essential destruction by state authority, if one were?

The only rule under which the existence of the federal government can be made secure is that states and territories shall treat as valid *all* demands made by congress upon citizens, whether natural or corporate, for the payment of money to the government, together with the means devised by congress for realizing the same, until the appropriate branch of that government itself shall have determined the contrary.

Without this rule, conflicts between the central government and the states would become frequent and dangerous. Differences of opinion touching the constitutionality of impositions by congress very easily arise. They have often arisen in the past, and will likely do so in the future. The action of the authorities of the state of South Carolina, with respect to the customs revenue, is a very memorable instance. No doubt those authorities were wholly sincere in the position by them assumed, and were able to support it by argument having a show of strength. Still, the fundamental vice of all inquiries by states and territories into the validity of federal exactions, is the fact that the government cannot be present. Such inquests are, so far as the government is concerned, always *ex parte*. The rights of the government are tried and determined without its ever being heard. No political organization, laying claim to paramount sovereignty, would suffer such a thing to happen.

The case now before the court is a most fit one for the application of this rule of non-interference by states or territories. As a matter of fact, the law of 1870 has been executed by the Interior Department continuously from the time of its passage. The patents for the lands have been, and are

being, actually withheld in obedience to that act. Whether or not the government conducts itself rightfully in so doing, is without *practical* consequence to the company, since the latter seems without means of enforcing conveyances, even if it were entitled to have them. To the company, therefore, the validity or invalidity of the act of 1870 is hardly better than an abstract question.

As shown by the quotation from the Dakota Statutes, on a previous page of this brief, the deed given upon the ripening of a tax sale vests in the grantee *an absolute title in fee-simple, subject only to claims of the territory itself.*

If these lands can be lawfully taxed, they can be sold to enforce payment of the taxes; and the sale will result in a deed of the character specified. *What then will become of the government's outlay for surveys?*

The legal title which the government is so carefully withholding will have been taken forcibly from it by the territory, and vested in the grantees named in the tax deeds.

The claim that a state or territory can do such a thing does not deserve to be discussed.

W. P. CLOUGH,
Atty. for Appellant.

APPENDIX.

Cass County v. Morrison.

Appeal by defendant from a judgment for taxes of the district court for the counties of Cass, Crow Wing, Wadena, Aitkin, and Itasca, *Stearns*, J., presiding.

Morrison & Fitch, for appellant, cited *Railway Company* v. *Prescott*, 16 Wall. 603, and *Railway Company* v. *McShane*, 22 Wall. 444.

C. D. Kerr, for respondent.

Berry, J. This is a controversy as to the taxability of certain lands embraced within the limits of the grant made by the United States to the Northern Pacific Railroad Company, by an act of congress, approved July 2, 1864. The stipulated facts upon which the case was determined by the district court are as follows, so far as here important: At and long prior to the time of the assessment and levy of the taxes in question, the railroad of said company was constructed and in operation across this state, and especially through the counties in which the lands to which this controversy relates are situated, and it has so continued to be operated to this time. The company has contracted to sell the lands to Morrison, who has paid for the same in full, and now contests the validity of the taxes. The government of the United States claims that before issuing patents to the company for lands, it is entitled to receive the cost of surveying, selecting, and conveying the same, from the company, and no patents for such lands have been issued, for the reason that the company has not paid such cost into the federal treasury.

It is agreed that, unless the failure to pay the costs mentioned prevents, the company is entitled to patents for the lands involved in the proceeding, and that they are subject to the taxes which have been levied upon them. The main question in the case is, do these lands belong to the United States? If they do, then they are exempted from taxation by that condition of the act of congress authorizing the people of the territory of Minnesota to form a state constitution and come into the Union, which requires that no tax shall be imposed on lands belonging to the United States. If, on the other hand, they do not belong to the United States, but

the company, having become entitled to a complete, perfect, and absolute title to them, and entitled to receive the proper evidence of such title from the United States, has contracted to sell them to Morrison, then, under the laws of this state, they are subject to taxation. As the land grant of the company within this state includes, if full, (as we understand it to be,) between two and three millions of acres, hundreds of thousands of which have already been sold, or contracted to be sold, by the company, as all will be in the future, the question presented is one of vast practical importance to the the people of this state, and especially to the inhabitants of the counties, towns, and other territorial subdivisions in which the lands lie.

The Northern Pacific Railroad Company was incorporated and endowed with a grant of lands by an act of congress, approved July 2, 1864. 13 U. S. St. at Large, 365. Section 3, so far as necessary to be quoted, is as follows: "And be it further enacted, that there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad, whenever it passes through any state," etc. Section 4 provides "that whenever said Northern Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the president of the United States shall appoint three commissioners to examine the same; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the president of the United States, and patents of land, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands, situate opposite to and coterminous with said completed sections of said road; and from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness, as aforesaid, and verified by said commissioners to the president of the United States, then patents shall

be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid: provided, that not more than ten sections of land per mile, as said road shall be completed, shall be conveyed to said company for all that part of said railroad lying east of the western boundary of the state of Minnesota, until the whole of said railroad shall be finished and in good running order," etc. Section 20 is as follows: "And be it further enacted, that the better to accomplish the object of this act—namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and the benefits of the same for postal, military, and other purposes—congress may at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend, or repeal this act." By an act of congress approved July 15, 1870, (16 U. S. St. at Large. 305,) among other things appropriating money for the survey of the public lands within the limits of the land grant of the Northern Pacific Railroad Company, it is provided "that, before any land, granted to said company by the United States, shall be conveyed to any party entitled thereto, under any of the acts incorporating or relating to said company, there shall first be paid into the treasury of the United States the cost of surveying, selecting, and conveying the same by the said company or party in interest."

From the concessions of the parties it appears that, except as respects the payment of the cost mentioned, everything has been done required by the terms of the grant to entitle the company to a complete, perfect, and absolute title in fee to the lands in controversy, and to entitle it to receive the proper evidence of such title from the United States. In other words, the company has earned and paid for the lands by complying with the conditions of the grant; and if a formal conveyance be necessary to vest it with the legal title, it is, nevertheless, in the fullest sense, the equitable owner of the land, and the legal title is held by the United States as a naked trustee, solely and simply for the company's use and benefit. This is so irrespective of any notion of a grant in *præsenti*, and its effect in conferring title *in præsenti*.

If, then, we leave out of view the provision before quoted as to the payment of the cost of surveying, etc., the case is

one which, under repeated decisions of the federal supreme court, the right and title of the company to the lands became such that they ceased to belong to the United States, and are therefore subject to taxation in accordance with the laws of this state. *Carroll* v. *Safford*, 3 How. 441; *Railway Company* v. *Prescott*, 16 Wall. 603; *Railway Company* v. *McShane*, 22 Wall. 444. Is this result affected by the provisions as to the payment of cost of surveying, etc., in the act of July 15, 1870? We think not. These provisions seek to impose a new condition upon the grant of lands made by the act of 1864. They require the company to do something more than that act required it to do to earn the lands, viz., to pay the cost of surveying, etc. To that extent the contract of the United States with the company is attempted to be impaired; and although the federal constitution contains no limitations (in so many words) upon the power of congress to pass laws impairing the obligation of contracts, the fifth amendment contains a clause declaring that no person shall be deprived of property without due process of law. This covers the case of a contract right, whether the contract be executed or executory; for a contract right of either kind is property. *Rice* v. *Minn. & N. W. R. Co.* 1 Black, 360; *Clark* v. *Mitchell*, 64 Mo. 564; *Twitchell* v. *Commonwealth*, 7 Wall. 321. We are therefore of opinion that it was not competent for congress to pass the provision requiring the company to pay the cost of surveying, etc., as a condition precedent to its right to patents for the lands granted to it by the act of 1864, and that that provision is therefore not binding upon the company, and does not affect its absolute, complete, and perfect right to such lands, and to the proper evidence of such right, upon compliance with the terms in that act specified. The power of amendment, reserved in the twentieth section of the charter, obviously fails to embrace any authority to attach any such new condition to the grant.

This case is distinguishable from *Railway Company* v. *Prescott*, 16 Wall. 603, and *Railway Company* v. *McShane*, 22 Wall. 444. In both of these cases the enactment requiring payment of the expenses of surveying, locating, and selecting the lands granted to the company, as a condition precedent to the issue of patents, was one section of an act so amending the original charter of the Union Pacific Railroad Company as largely to increase its original grant of lands. This act was one whole, and in accepting and availing itself of the increase of its land grant, the company accepted the whole act,

thereby assenting to the imposition of this new condition attached to its right to its original land grant. The condition was a part of the act by which the land grant was increased, and the increase was, therefore, controlled by it as a matter of course.

The district court decided that the lands in controversy were properly taxable, and properly taxed. Upon the grounds above indicated, we are of opinion that the decision was correct, and it is accordingly affirmed.

28 Minn. pp. 257–261.

In the Supreme Court of the United States,

OCTOBER TERM, 1884.

No. 1075.

NORTHERN PACIFIC R. R. CO.,

Appellant,

vs.

IVER L. ROCKNE, COUNTY TREASURER OF TRAILL COUNTY,

Respondent.

BRIEF FOR APPELLANT, IN REPLY TO CERTAIN PROPOSITIONS ADVANCED IN RESPONDENT'S BRIEF.

W. P. CLOUGH,
For Appellant.

THE EVENING POST JOB PRINTING OFFICE, 206 & 208 Broadway, N. Y.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1884.

(No. 1075.)

NORTHERN PACIFIC RAILROAD COMPANY,
Appellant.

AGAINST

IVER L. ROCKNE, COUNTY TREASURER OF TRAILL COUNTY,
Respondent.

Brief for Appellant, in Reply to Certain Propositions Advanced in Respondent's Brief.

I.

On the top of p. 4 of respondent's brief occurs the following erroneous statement:

"Prior to the so-called Amendatory Act of 1870 the "company had accepted the original grant, and had, on "faith thereof, constructed the line across the State of "Minnesota."

The facts touching this point are recited in the *third* finding of facts by the District Court. The words whence counsel evidently derived their mistaken impressions are as follows:

"All that part of the said railroad within the Territory of "Dakota has been located and built since July 15, 1870."

This passage does not assert that any of those portions of the line situated *elsewhere* had been located or constructed *prior to* July 15, 1870; nor, as a matter of fact, had any been.

II.

No position here assumed by the railroad company conflicts, in the smallest particular, with either of the cases cited on pages 2 and 3 of respondent's brief.

The argument of counsel upon the nature of the estate acquired by the company under its grant, amounts simply to this: The grant of 1864, having been one *in præsenti* must immediately have conferred upon the grantee an estate of that class known in the common law as *estates in fee simple*.

Nothing could be more fallacious.

The rules of the common law, or even those of equity, afford no model for the interest passed to the grantee by such grants. They are *sui generis*. The instrument, too, passing the interest, is something quite apart from any conveyance in use under the common law, or, indeed, under any body of jurisprudence regulating transfers between individuals.

This Court has aptly characterized land grant acts as *at once conveyances and laws*.

Hence, when this Court declares grants like that one to this company to be "*grants in præsenti*," it does not mean that, when such an act has been passed and accepted, an *estate in fee simple*, or *for life*, or *for years*, vests, *forthwith*, in the grantee, *as to any definite tract of*

land; it only means that an estate or interest, *of the new and particular species originating in such grants* passes at to once the grantee.

Any other theory would be at war with the manifest state of things.

Although such grants are present, could a grantee, upon acceptance, and prior to the location of its road, point its finger to a foot of ground, and say: "I own this?"

Even after the definite location of the line of road, and the filing of a map showing it with the Interior Department, and the approval of the line by that department, could the grantee transfer to any one such a title in any specific tract as to constitute him owner of it, without the construction of that part of the railroad which it had been granted to aid?

These suggestions are quite adequate to expose the fallacy of attempting to compare the interest arising from an unearned land grant with the estate arising out of a deed between individuals.

There is nothing in the least degree inconsistent in the enjoyment by the grantee in such a grant, of an interest in the granted lands falling little short of full ownership, and the co-existence in the government of a legal title that can be retained until the grantee shall have paid the expense of defining the tract, and of making the title papers.

In neither *Prescott* vs. *The R. R. Co.*, nor *McShane* vs. *The R. R. Co.*, did this Court hold anything further necessary to prevent lands from falling into the body of property taxable under State or Territorial laws, than the retention by Government of the *mere* legal title, with the right to withhold the same until the cost of surveying and selection had first been made.

On the contrary, it was conceded, in each of those cases, that the company held all the *residue* of interest and right going to make up the full title. The company had been dealing with the lands, as if none other had a spark of interest in them; but such action of the company was not even criticised by this Court.

The grant to the Northern Pacific Company by the original act, was, undoubtedly, one *in præsenti;* but to what?

Not to any specific tract of land. Not to the specific tracts which the territorial authorities here seek to tax. That grant had not attached to any of these tracts until after the passage of the Act of 1870, imposing upon the company the cost of surveying and selecting the lands.

Furthermore, that grant did not transfer, nor purport to transfer, a present "*legal title*," to any tract. That title, by the very terms of the act, was retained in the Government, to be held until the completion of the sections of road opposite the tracts, and then passed to the company by means of *patents*.

The case is, therefore, quite different from one where, under an act of Congress, affairs have developed to such a stage that interests have attached to specific property. Before the specific parcels which are to pass under a grant like this one have been identified, by the location of a general route, or by specific administrative withdrawals for the company's benefit, or by the location of a definite line, everything partakes of the nature of *contract*, merely; and no clause of the Federal Constitution expressly forbids the passage *by Congress*, of laws impairing the obligation of contracts.

But when, by either of the methods mentioned, the rights of the grantee have attached to specific tracts; then the alteration of the grant, to the detriment of the grantee, falls within the express prohibition of legislation effecting the divestiture of property without due process of law.

This is believed to be a sound distinction; and one that must be recognized as correct.

The Act of 1870 did not purport to resume the *sui generis* estate, presently vested in the company by the Act of 1874, but only to deal with the "legal title" remaining in the hands of Government. What, therefore, the Act of 1870 did, was not to take away an *estate already vested*, but, rather, to *add something to the considerations* for which it had *contracted* to pass over "legal titles" in the future. The Act of 1870, if passed without the prior or subsequent assent of the company, may be regarded a *violation of a contract* by Congress, but not a deprivation of a vested estate.

But, the foregoing suggestions are not made with any belief that this court will, in this litigation, enter upon the inquiry whether or not the act of Congress of July 15, 1870, was, under the then existing state of things within the competency of that body. As argued in the principal brief for appellant, such questions never can be raised by third parties; and the validity of an act of Congress, requiring the payment of money into the public Treasury of the United States, cannot be litigated in a suit to which the Government is not, and cannot be, a party.

III.

It is argued on behalf of respondent, that a State or Territory wherein such lands lie is not a *third* party within the meaning of the rule that the constitutional protection of contracts can be invoked solely by *parties* or *their privies;* and that a State or Territory, seeking to levy a tax upon the lands, and to sell them for non-payment of the tax, is a privy of the grantee company, and as such can attack any statute relating to such lands which the grantee itself might impeach.

This position is unsound for several reasons. In the first place, there can be no relation of *privity* between the owner of land and the public authorities who are seeking to levy and enforce a tax against it. This principle underlies taxation of every species. The taxing power, instead of claiming *under* or *through* the owner of the property taxed, always claims *adversely* to him. On this ground tax proceedings are always strictly scrutinized; and the Courts hold invalid all such proceedings where the laws relating to taxation have not been complied with in every substantial particular.

If the taxing power claimed under or through the owner of the taxed property, taxes would necessarily be subservient to liens put upon the property prior to the levy of the tax; for it is a universal rule that *privies* can claim no greater estate than those with whom their relation exists,

in absence of fraud, either actual or constructive. It is only because the attitude of the taxing power is adverse to that of the owner, and to that of all parties standing in privity with him, that a mortgage lien of the year 1880 is displaced, not merely by a tax lien of that same year, but as well by those of all subsequent years in succession.

The owner of land, and all parties claiming under or through him, that is, all parties standing in privity with him, are grouped upon one side, and the taxing power stands arrayed against them, collectively, upon the other. The owner of lands, his heirs, assigns and lien creditors are *privies*, but the taxing power is the *adversary* of them all.

The relation between a State or a Territory seeking to take away property through the taxing power, and the owner of the property so sought to be taken, can be no more in the nature of privity than that between a railroad company, seeking to take it, through the power of eminent domain, and the owner. Yet, in the latter case, the Supreme Court of the State of Minnesota has held, in *Ames vs. The Lake Superior and Mississippi Railroad Company*, 21 *Minn.*, 241, cited in the principal brief for appellant, that the landowner cannot object that an amendment to the Incorporating Act is invalid, because of impairing an obligation between the State and the incorporators.

Advantage to be gained by a successful attack of the alleged invalid law, is not, by any means, the test of the existence of a right to make the attack; for, as has been seen, even the protection of property against appropriation under the power of eminent domain, will not furnish it.

The fact, therefore, that, if the Act of Congress of July 15, 1870, can be successfully impeached, the taxable property within the Territory of Dakota will be increased, does not tend to show that the Government of that Territory stands in the shoes of the Northern Pacific Railroad Company, so as to authorize the former to object to, and to decline to accept, any legislation which the latter might.

The argument, that a relation of privity exists be-

tween the Territory and the railroad company, in respect to these lands, rests upon this most obnoxious of fallacies, that it necessarily *assumes* the truth of the very proposition to be demonstrated.

There certainly can be no privity between the Territory and the company touching lands the former is not empowered to tax. As to *all such* lands, the parties are clearly strangers. It is presumed that even respondent's counsel would not deny that. It is only by reason of an alleged right to tax the lands, that the privity is assumed at all. But, whether or not such right exists, is the very point in litigation; and the dispute assumes this peculiar form, that it must be conceded the Territory is without power to question the validity of the Act of 1870, unless it has the right to tax the lands; while the right to tax cannot be claimed, except through a successful attack of the act. In other words, the argument for respondent describes this circle:—The lands are taxable *solely* because the Territory can attack the act, and the Territory can attack the act *solely* because the lands are taxable!

This is the sum total of argument of which the affirmative of the proposition here contended for by respondent's counsel will admit. However much the quantity of verbiage employed in its behalf be increased, when boiled down to a state of consistency, that is all it amounts to.

The truth undoubtedly is, that the territory, instead of being in privity with either the company or the United States, in this matter, stands in adverse attitude to *both*.

On July 15, 1870, no part of the line of road had even been located. Hence, clearly, none of the lands afterward sought to be taxed had, at that date, become taxable by the territory. Whether or not any of them ever would become so, depended upon a series of future contingencies. The territory then had no interest in these lands, vested or contingent. As between itself and the territory, the United States could do with them as it pleased. It might devote them to perpetual use as a public park, or an Indian reservation; and, had it done so, the territory could raise no effectual objection, although the direct consequence of so doing would be to perpetually retain the

lands outside the body of taxable property within the territory. The railroad company might, possibly, have complained of such a diversion of the property, but the territory could not have done so.

How, then, can it be said that the territory can complain of an act which still leaves the lands in the company's grant, and merely imposes, as a condition to the transfer of the legal title, that the company shall bear the charges of the transfer?

The company itself might exclaim, that the act was unjust and burdensome to it; but the territory could say nothing.

If, instead of the act of July 15, 1870, Congress had passed one declaring that the lands, previously granted by the act of July 2, 1864, to the Northern Pacific Company should be set apart for perpetual use as an Indian Reservation, and the company had afterwards located and completed its railroads precisely as it has done, could the territory, assuming the later act to be invalid, because impairing the validity of a contract, or resuming a vested estate, proceed to levy taxes upon the lands as property of the company, and to sell them for the enforcement thereof?

It is confidently believed that no one would claim the territory could do so. All would admit the question of the validity of such legislation to be one lying exclusively between the grantor and grantee. No third party, be it a private party, or territory, or a State, could intervene.

If, then, the territory does not occupy such relations to this company as to empower it to challenge a complete and absolute diversion of the lands to a use other than the satisfaction of the grant, how can it be argued to occupy a relation empowering it to impeach an act merely imposing a new condition to the execution of conveyances under the grant?

The position, therefore, assumed by appellant in its principal brief, namely:—*That, so long as the Act of* 1870 *is actually enforced against the company, by the withholding of the legal title to the granted lands in the hands of Gov-*

ernment, to secure the payments imposed by the Act of 1870, *and until, by a direct proceeding between the Government and the company that act has been duly adjudged invalid, the same is to be treated as valid by all third parties, including the States and Territories wherein the granted lands lie; and the lands are retained out of the body of taxable property,*—must be accepted as sound and unimpeachable.

IV.

The form of the remedy here asked by the company, namely, an injunction to restrain the enforcement of the taxes by the sale of the land, is identical with that granted by this Court to the company in the suit *McShane* vs. *R. R. Co.*, 22 *Wall.*, 444.

Hence it must be the correct one.

This Court, in that case, held that, where, through omission on the part of the grantee to pay the costs of surveying and patenting the granted lands, no patents for such lands, transferring from the Government the legal title, had been issued, and the lands were, notwithstanding, sought to be taxed, a proper case arose for the granting of an injunction at the suit of the grantee.

Such suits as that one and this one are not cases of grantees taking advantage of their own wrong and laches. The United States have not seen fit to fix any date, in any of the acts like that here under view, within which the costs of surveying and transferring must be paid, and patents for the lands be taken out. As suggested in the principal brief for appellant, Congress left the inconveniences resulting from want of the legal title, to be the sole penalty for non-compliance with the requirements of the acts.

But the claim on behalf of the territory that the company is here taking advantage of its own wrong, is merely the converse of that concerning the alleged invalidity of the Act of 1870.

That claim is, that the *government* has violated its obligation to the *company; this one*, that the *company* has violated its obligation to the *government*.

But, since, in respect to the former matter, only the *company* can complain, if any wrong has been done, so, in the latter, only the *government* can do so.

No obligation exists on the part of those dealing with the government for the acquisition of lands, to hasten the completion of the transactions, so as to render the lands taxable at the earliest possible date.

When such a transaction shall be closed, does not concern the State or Territory wherein the lands lie. The parties to the business, namely, the government and the grantee, are at liberty to consume much time or little, one year or a century, in perfecting title in the latter; and the State or Territory cannot complain in either case.

Hence, delay in closing up such dealings is a matter which a State or Territory has no right to mention as a defense, when called to answer for what would otherwise amount to a manifest wrong.

W. P. CLOUGH,
Attorney for Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

(No. 1,075.)

NORTHERN PACIFIC RAILROAD COMPANY, *Appellant*,

vs.

IVER L. ROCKNE, County Treasurer of Traill County, Dakota Territory, *Respondent*.

BRIEF FOR RESPONDENT.

M. S. WILKENSON,
Attorney for Respondent.

MILLER & GREENE,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

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(No. 1,075.)

NORTHERN PACIFIC RAILROAD COMPANY,
Appellant,

vs.

IVER L. ROCKNE, COUNTY TREASURER OF TRAILL COUNTY, DAKOTA TERRITORY, *Respondent.*

BRIEF FOR RESPONDENT.

The case is properly stated on pages 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11 of appellant's brief.

Only one question is raised in this court:

Did the supreme court of the territory err in holding the land in question taxable?

I.

Who owned the lands in question at the time the taxes were levied?

If the appellant owned them, they were taxable; if the title still remained in the United States, they were exempt from taxation.

Section 1851, Organic Act of Territory.

The appellant derives its interest in and title to the lands in question solely through an act of congress, approved July 2, A. D. 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound, on the Pacific coast, by the northern route."

The words, "and be it further enacted that there be and hereby is granted to the Northern Pacific Railroad Company," found in section 3 of said act (13 U. S. St. at Large, p. 367), followed, as they are, by language defining the area of the lands granted, constitute the basis of all the wealth and power of this corporation. Without such words it would have had no property to protect, no rights to enforce; much less could this action have been maintained. No amendment to this original grant has added to their force nor impaired any rights vested by them.

The words "that there be and hereby is granted" are words of absolute donation, and import a grant *in præsenti*.

Leavenworth & C. R. R. Co., v. *U. S.* 2 Otto, 741.
Railroad Co. v. *Smith*, 9 Wall. 95.
Schulenburg v. *Harriman*, 21 Wall. 60.
1 Lester, 513–8, opinion 257.

Such words vest a present title in the grantee, though a survey of the lands and a location of the road are necessary to give precision to it, and attach it to any particular tract. The grant, then, becomes certain, and by relation has the same effect upon the selected parcels as if it had specifically described them. In other words, the grant was a float until the line of the road should be definitely fixed.

Opinion, *Leavenworth & C. R. R.* v. *U. S.* 2 Otto, 741.
Lesseuir v. *Price*, 12 How. 72.
The Blair & C. Land Co. v. *Kitteringham*, 43 Ia. 437.
Lee v. *Summers*, 2 Oreg. 260.
See, also, *Northern Pacific R. R. Co.* v. *Peronto*, 14 N. W. Rep. 103.

Again, the title of the United States may pass as well by

an act of congress in the words of a present grant, as by patent.

Wilcox v. *Jackson*, 13 Peters, 499.
Stoddart v. *Chambers*, 2 How. 285.

And the position that the grant in question conveyed a present existing title to the N. P. R. R. Co. of all the lands granted, is supported by the clear weight of au thority.

Schulenberg v. *Harriman*, 21 Wall. 60.
Central Pacific R. R. Co. v. *Dwyer*, 1 Sawyer, 641; 13 How. 18; 19 How. 132, 175.
R. R. Co. v. *Smith*, 9 Wall. 95.

But even if the grant in question did not vest the appellant with the legal title to the lands, still such lands may be taxed before the government has parted with the legal title, when the right to the title is complete.

Carrol v. *Safford*, 3 How. 441.
Ry. Co. v. *Prescott*, 16 Wall. 603.
Ry. Co. v. *McShane*, 22 Wall. 444.

Was not the title of the appellant complete at the date of the levy of these taxes?

In 1880 the taxes in question were levied. (See Transcript, p. 3.)

Sixteen years had elapsed since the date of the appellant's original grant.

The terms of the original grant, with all its conditions, had been accepted, and the company, on the faith of this grant, had been engaged nearly fourteen years in the construction of its road.

It had built and put in operation a continuous line of railroad and telegraph from the waters of Lake Superior at Duluth, through the state of Minnesota and across the territory of Dakota, to and beyond the Missouri river.

All this had been done in conformity with the grant in question. (Transcript, p. 3.)

Everything had been done by the company, required by the terms of the grant, to enable it to acquire a complete

and perfect title to the lands in controversy in this action, unless we except the payment of the costs of survey, etc., required by the act of 1870.

See Transcript, p. 3.

Prior to the so-called amendatory act of 1870, the company had accepted the original grant, and had, on faith thereof, constructed its line across the state of Minnesota.

Transcript, p. 3.

And it is now conceded by the parties to this controversy that, except for the non-compliance of the company with the requirements of the act of 1870, everything had been done by the company, at the date of the levy of the taxes, to entitle the company to a complete and absolutely perfect title to the lands in question, and the company was then entitled to a patent as evidence of its title to these particular lands.

But, notwithstanding the so-called amendatory act of 1870, we have seen from the authorities that the company owned these lands, by virtue of a present grant, six years before the passage of the act of 1870.

What was done afterwards only gave precision to the grant, and resulted in making definite what particular lands the company owned by virtue of its grant.

What effect, then, had the act of 1870 on the title of the company?

Did it operate to divest the company of the title already granted?

Did it operate to reinvest the United States with what it had given away six years before?

What is this act for which this corporation now, for the fisrt time in all these years, shows some degree of respect?

It came into existence as a mere "rider" on "An act making appropriations for sundry civil expenses of the government for the year ending June 30, 1871, and for other purposes," and is as follows:

"For the survey of public lands within the limits of the land grant to the Northern Pacific Railroad Company, in a direct line extending from Duluth, on Lake Superior,

to Georgetown, on the Red River of the North, ninety-five thousand nine hundred and eighty dollars: provided, that five thousand dollars of this appropriation shall be expended for office work by the surveyor general of Minnesota: and provided, further, that before any land granted to said company by the United States shall be conveyed to any party entitled thereto under any of the acts incorporating or relating to said company, there shall be first paid into the treasury of the United States the costs of surveying, selecting, and conveying the same, by the said company or party in interest."

16 U. S, Stats. at Large, pp. 305, 306.

There are, perhaps, three ways in which this act may be construed so as not to affect in anywise the title to the land held by the company, or those claiming under it, by virtue of the original grant:

(*a*) It will be noticed from the language used that congress, in making this appropriation, recognized the fact that the lands had already been granted; that some of the lands may have been sold, and the purchasers therefore entitled to patents; that the grant was *in præsenti*, and divested the government of the title, while it still had power to make to the parties entitled thereto proper evidences of title. It will further be seen that the act makes no distinction between those lands which lay opposite that portion of the completed road and that portion of the line where no work had been done.

Is it not, then, a fair and rational construction of this act to say that the law-making power intended thereby, *not* to divest the company, or persons interested in these lands, of any title given by the original grant, but simply to declare that neither the company nor persons claiming under it should receive from the United States the evidences of their previously acquired title to particular tracts of land until the costs of survey should be paid?

Does not this act simply declare, "You own the lands, but we shall retain the patents till you pay the costs?"

Thus construed, the act, though apparently adding a new condition to the original grant, would in nowise affect

the pre-existing title, and the owner of such lands would thus be compelled to pay the taxes thereon as one of the burdens of ownership.

This case must stand upon its own merits.

This act has never been before this court for construction.

The distinctions between this act and those passed upon in *Railway Co.* v. *McShane* and *Railway* v. *Prescott* will be noticed hereafter.

And this court will, by the application of a familiar rule, if possible, by any reasonable construction, uphold the grant of 1864, and preserve its original force and validity.

(*b*) If, however, the construction for which we have just contended be not correct, then the act of 1870 must be construed either as one by which the government sought to reinvest itself with the title to lands it had ceased to own,—an act of *forfeiture* or *confiscation*, and therefore absolutely void,—or

(*c*) An act impairing the obligation of the original grant, and therefore void not only as to the corporation not assenting thereto, but as to all persons interested in asserting its invalidity.

In *Wilkinson* v. *Leland*, 2 Pet. 657, Mr. Justice Story says: "We know of no case in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the Union."

Again: "That government can scarcely be deemed free where rights of property are left solely dependent upon the will of a legislative body without any restraint." * * * "The people ought not to be presumed to part with rights so *vital to their security and well being without very strong and direct expression of such an intention.*" Cooley on Con. Lims. 165.

Again: "It is clear that statutes passed against plain and obvious principles of common right and common reason are absolutely null and void so far as they are calculated to operate against those principles."

Howe v. *McClaws*, 1 Bay, 98.

Cooley on Const. Lims. 166.

And, "Every act of the legislature repugnant to the fundamental law is absolutely void."

Potter's Dwarris on Statutes and Constitutions, p. 46.

But we have already seen, from repeated decisions of this court, that grants of this character pass a present title; that so far as mere title is concerned no patent is necessary; that they are mere matters of convenience; in other words, simply evidences of title. They "*confirm*," in the language of the act in question, but do not grant, bargain, or sell.

When in such cases the "conditions subsequent" have been performed, the patents come from the executive, not as from one having the power to *grant*, but as from an authority having power to *confirm*. One authority is legislative, the other ministerial. So here congress retained nothing but the right to declare a forfeiture for non-performance of conditions subsequent.

If A. by a proper instrument grant to B. all his lands within certain parallels of latitude and longitude, with a covenant to make to his grantee deeds of particular tracts after they have been made definite by survey, and then afterwards declare that he will not confirm by deeds the title already granted till the cost of survey have been paid, can it be said that such declaration would have any binding force on any one interested in asserting its nullity?

Can it be said such a declaration, no matter how made, would cast even a cloud upon the title of B.?

Could B., after years of refusal to pay such costs, and while still withholding payment, be permitted to say, for the *purpose of evading taxation*, "*I do not own these lands?*"

Is it not true, then, that under the authorities last above cited, and the law as it is, the act of 1870 is void, not as "impairing the obligation of contracts," but because the grant of 1864, by the performance of the conditions subsequent by the company long prior to the levying of town taxes, ceased to be a contract on the part of the company and as to the world, within the meaning of the constitution?

Ownership cannot depend entirely upon the solemnity of a written instrument, nor upon the unexpressed will of the owner.

A party cannot say, "I own this property as to the government, but not as to the people with whom I deal;" so we insist that the so-called amendatory act in question could have no more validity than an act which sought to transfer the property of A. to B. without the consent of either, or an act which confiscated, or declared forfeited, the property of a citizen for perjury, or any other crime.

But the appellant urges that this position, and the authorities last above cited, are unsound, and that in such cases there can be no such thing, abstractly, as an unconstitutional law; that whether or not an act of Congress is repugnant to the fundamental law, and void, may, and in this case does, depend upon the consent of the party to such an enactment.

Grant this, for the purposes of agreement, and may it not be well said that the appellant is as much a stranger to the act of 1870 as the authorities of Traill county? Did this legislation confer any benefits that impelled recognition from the company?

Certainly not. It was an attempt to impose a burden of $95,980 without conferring a benefit upon the corporation; for by section 6 of the act of 1864 (13 U. S. Stat. at Large, pp. 367, 369), congress had already provided for the survey of these very lands at the expense of the government.

It is evident, therefore, that the appellant was not a party to the "appropriation" act of July 15, 1870, *prior* to its passage.

When, then, did this company cease to be a stranger, and consent to be a party, to this legislation? For eleven years prior to the commencement of this action it failed to recognize its validity, and refused to comply with its requirements. The very complaint, upon which the company stands in this court, alleges the *claim* of the government to the costs of survey, and its refusal to issue patents without payment thereof. (PP. 9 and 10, Transcript.)

Mr. Newport, the land agent of the company, verifying the complaint, swears to the same thing. (Transcript, p. 11.)

Such refusal by the government to issue patents, without being paid the costs of survey, fairly imply a demand or request by the company for patents *without* payment of such costs. For fourteen years this corporation has said, by acts which fairly appear on the record, "I'll ne'er consent" to this act; and the first and only record made of any *voluntary*—not substantial—consent thereto will be found at page 25 of appellant's brief, in which counsel says, "there is no evidence that the company has not assented."

When were the costs of survey to become due? Never or "*sometime*" is the answer of counsel on page 23 of this brief, and, if his argument be good, the terms ar synonymous. If elementary principles could be invoked, it would seem that the costs referred to would become due and payable at the completion of the labor performed and expenses incurred in making the survey; and, in general, it would seem that a failure for nearly fourteen years to pay such costs, when sworn to, as in this case, by the party in default, would be construed to be a refusal to pay, or to recognize any obligation of payment.

The fallacy of the argument of the learned counsel in this respect is only excelled by the statement at page 25 of appellant's brief, in which he says in italics: "What *instance can be cited where a party founding his claim upon a given statute has been denied it by a court because* of the objection by his adversary that the statute was void, as violating a legislative contract with the claimant himself?"

There can be but one answer to this argument. The appellant in this case *founds its claim upon no statute, but upon the violation* of a statute whose aid it invokes. It comes into this forum as into a court of equity, and while *hinting* at the validity of the statute, whose protection it claims, it bases its rights to equitable relief upon its *refusal* to *comply* with the requirements of that statute. It does not come into court with clean hands. Forgetting

to do equity it asks equity. Refusing to pay to the general government what, for the purposes of argument, it admits to be due, it at the same time refuses to pay the assessments of the local government, and alleges its default in one case as a justification for its default in the other.

"What *instance* can be cited" which will sustain such a position? It is now too late for this corporation to assert the validity of the act of 1870, or any presumed acquiescence in its provisions.

In *Cass County* v. *Morrison*, 28 Minn. 257, this company, ignoring any binding force of the act in question, had sold or contracted to sell certain lands within its grant to Morrison. He had paid the company in full, and yet sought to evade the payment of taxes on the very grounds presented here as a basis for relief. The company in that case failed or refused to pay the costs of survey, and thus placed upon record its non-compliance with this statute.

The case of the *Northern Pacific Railroad Company* v. *Peronto*, 14 N. W. Rep. 103, is also in point. This was an action of ejectment. The lands sought to be recovered lie within the limits of the original grant to this company —on the west side of the Red River of the North and within the limits of the city of Fargo. The costs of surveying the lands had not been paid, and, so far as their taxability was concerned, it will not be denied that they were in the same condition as the lands sought to be relieved from taxation in the case at bar. The case was tried in the district court of the Third district of Dakota, judgment was rendered for plaintiff, and defendant appealed to the territorial supreme court. There the judgment of the district court was affirmed, and the defendant appealed to this court, where the action is now awaiting final determination.

Without saying anything which might in anywise affect the merits of that case, it is doubtless proper to say that this company there alleged the ownership in fee of the lands in question. It stood upon the strength of its own legal title. No allusion is made in the complaint or answer to the act of July 15, 1870, and the plaintiff by its complaint ignored the act entirely; thus again placing upon

judicial records its claim of legal title to lands to which it certainiy had no better title than to the lands whose taxability the appellant in this case denies.

The grant of this company was by our territorial supreme court construed, and the doctrine herein contended for fully sustained. It was there held that "the act of congress of July 2, 1884, granting lands to the Northern Pacific Railroad Company in aid of its road, was a grant *in præsenti*, and vested all the title of the United States then had, subject to the condition subsequent to be performed by the company. There being no condition that the land should revert to the grantor in case of a failure to perform the conditions by the grantee, such title would be unaffected by a failure to perform such conditions until the United States should enforce a forfeiture."

Such was the decision of that court, sanctioned by the decision of the supreme court of Minnesota in *Cass County* v. *Morrison*, *supra*, and sustained by numerous decisions of this court, construing legislative grants similar to that now under consideration.

We insist, therefore, that the company never became a party to the act of 1870; that it appears of record in this case; and wherever the appellant has been in court, when the question has been raised, its attitude has been that of hostility, and not one of consent. And it is a part of the history of the country through which this road passes, that, ever since the passage of the act in question, this corporation has, by acts and declarations, and as well also by deeds of conveyance and contracts of sale spread upon the records of counties along its line, openly and notoriously declared to the world its ownership in fee of these lands, regardless of the pretended amendatory act of 1870.

We contend, further, that in such case there can be no presumption of consent, because no benefits were conferred upon the company by the act in question, but simply a naked burden; that the rule of presumptive consent applies to those cases where benefits as well as burdens are conferred by an act otherwise unconstitutional.

For the reason, then, that the record shows that the company has always refused compliance with this act, we

say the cases of *Hagar* v. *Reclamation District No.* 108, 111 U. S. 701, and *Ames* v. *The L. S. & M. R. Co.* 21 Minn. 241, cited in appellant's brief, are not applicable to the point now under discussion.

But it is urged that the respondent cannot be heard to declare the unconstitutionality of the act in question because he was not a party to it, and that, therefore, the cases last referred to *have force* in this case.

We answer, if, as we have tried to show, neither the appellant nor the respondent was a party to the act, then one might assert its invalidity as well as the other.

But if it be held that this act was an attempt on the part of congress to reinvest the government with an interest in or title to these lands, without consideration or assent, then it was absolutely null and void; no one was bound by its provisions, and any one might assert its invalidity.

If, however, as counsel suggests, it merely impaired the obligation of an existing contract between appellant and the United States, then we contend that it was voidable, not only as to the *party* not assenting to it, but also as to any one *interested* in *asserting* its invalidity.

The rule is not, as counsel alleges, that only parties to such legislation can object to it. The rule is certainly broader than that, and must permit not only parties, but *privies* and all others *interested*, to object to its enforcement. True, it is said a "court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has *therefore* no *interest* in defeating it;" but is not the converse of this proposition equally true? Can it be said that the act of 1870 did not affect the rights of municipalities in the states and territories through which this railroad passed, and that they have no interest in defeating it?

Can it be said—after the act of 1864 had taken from the public domain millions of acres of lands, and, by vesting the title to such lands in this company, placed them within the jurisdiction of local taxing authorities, and that after such authorities have levied taxes thereon—they have no interest in asserting the invalidity of an act which exempts such lands from taxation? If such lands were not properly forfeited to the government before the levy

of such taxes, can they be removed from the domain of taxation now, without payment of taxes already levied, even though the company does consent?

But it should be remembered that for nearly eleven years before these taxes were levied, and twelve years before this action was commenced, the company, as seen by its complaint herein, had refused to recognize the validity of the act by declining to pay a dollar of the costs of surveying these lands.

Not till the danger of the taxation of all its lands became imminent, not till *these* Traill county lands had been taxed, and not till the *argument* of counsel was printed, did the company give any pretense of consent to the payment of survey costs.

It cannot be denied that during this period of the company's non-compliance with the act, the taxing authorities of Traill county, acting upon the construction which the company itself had then adopted, levied the taxes in question.

Under such circumstances, will a court of equity say that at this late hour the appellant can, by an argumentative consent, exempt these lands from taxation?

Again, if the argument of counsel for appellant in this respect is worth anything, this company could refuse for all time the payment of the costs of survey, and by *that act alone hold millions of acres of lands free from taxation, and thus shift the burdens and expenses incident to state and territorial governments upon the people whose industry and enterprise greatly enhance the value of every acre of land within this enormous grant.*

Yet the counsel says this was what congress intended when he says the payment of the costs "was purposely left by congress to the convenience of the company."

Page 21, Appellant's Brief.

If congress did intend to leave the payment of costs to the convenience of the company, did it not intend in withholding the patents to withhold, not the title, but the "*convenient*" *evidences of title?*

We insist that this argument fully supports the position we have already taken, to-wit:

That by the act of 1870 congress sought not to affect the title to these lands, but to deprive the company of the conveniences, and those claiming under it, of patents, till it or its assigns had paid the costs of surveying its lands.

And we urge upon the court that if this construction be reasonable it should be adopted, and that the court should not, unless compelled by absolute necessity, adopt any construction of the act which would make the payment of the costs of survey a matter "*going to the foundation of the company's right to the land.*"

II.

The charter of the Northern Pacific Railroad Company, as to the matters here discussed, has been before but two courts for construction.

The supreme courts of Minnesota and Dakota, the former court without a dissenting opinion, fully sustained the position here taken, that the grant operated to divest the government of ownership, and vested it in the company, and made the first judicial distinction between the charter of this company and that of the Union Pacific Railroad Company. The judges of the latter court were divided in their opinions in this case, hence no opinion was given; but in *Northern Pacific Railroad Company* v. *Peranto* the supreme court of Dakota fully sustained the position here taken as to the nature and effect of the grant.

The appellant bases its right to relief mainly on the authority of *Prescott* v. *Railway Company*, 16 Wall. 603, and *Railway Company* v. *McShane*, 22 Wall. 44.

As the latter case reverses the former, on a point not material here, and affirms it as to matters which the appellant insists are important in the case at bar, we shall consider only the case last cited.

The charter of the Union Pacific Railway was then construed. After reading the act of July 2, 1864, incorporating the Northern Pacific Railroad Company, in connection with that of the Union Pacific Company, it would seem to require no argument to convince a reasonable mind that

the cases cited in 16 and 22 Wall. have no applicability to this case.

All those portions of the charters that are material to this controversy are quoted on pages 12 and 13 of appellant's brief.

It is true that sections three (3) of both acts are alike, and both are in the language of grants *in præsenti*.

But, construing sections 3 and 4 of the Union Pacific grant together, it will be seen that the completion of the road in the manner prescribed by section four (4) is a condition *precedent* to the company's receiving title. The effect of the words "is hereby granted," so far as importing a present grant is concerned, is destroyed by the provision of section four (4) that *after* all the conditions named have been performed, "patents shall issue *conveying* the right and *title to said lands to said company*."

But the effect of the words which import a present grant in section three (3) of the act of incorporating *this* company remains not only unimpaired, but is really strengthened by the words used in section 4 of that act, which provide that "patents of lands, as aforesaid, shall be issued to said company, *confirming* to said company the right and title to said lands."

In other words, in this case the grant conveys to the company the right to the land, whereas, in the other case, the title is conveyed by patent.

In this case the conditions named are conditions subsequent, while in the other they are conditions precedent.

See pages 12 and 13, Appellant's Brief.

Vide, also, *Cass Co.* v. *Morrison*, *supra*.

Again, the original charter of the Union Pacific road was amended in 1864, and it is this amendment that counsel at page 12 of appellant's brief, ingeniously places opposite the so called amendment of 1870 to the Northern Pacific grant.

By the amendment of 1864 to the Union Pacific charter it will be noticed that that corporation received *additional lands*.

13 U. S. St. at Large, p. 365.

And, of course, if it accepted the benefits of the act, it was conclusively presumed to have accepted its conditions, namely, the payment of the costs of survey, etc., whereas, by the act of 1870, this appellant received nothing. One act was an amendment to the charter of the company; the other was part of an appropriation bill.

The differences between the two acts, and the amendments thereto, are sufficient, it seems to us, to show the absolute inapplicability of the cases relied on by counsel to the case now in court.

The construction placed by this court on the charter of the Union Pacific Railroad Company in nowise determines the character of the grant to this appellant.

We therefore claim that it is entirely immaterial whether this corporation ever pays the government the costs of surveying these lands or not, or whether or not the lands are ever patented. *It*, and not the United States, owns these lands, and it ought not to be permitted by a court of equity to make the "make-shift" of its own laches as an excuse for failing to bear its share of the burdens of local government.

The act of 1870 clearly contemplates a sale of these lands by the company, for it provides in effect, before any party in interest shall receive patents, the costs of survey, etc., must be paid.

Is not this, in fact, a recognition of the right by the party purchasing the lands to pay such costs, and thus avail himself of the "convenience" of a patent?

And if any purchaser could pay such costs, could not the purchaser at a tax sale do so as well as a purchaser from the company? If the company can sell these lands, and receive payment in full therefor, cannot the taxing authorities do the same, in the manner prescribed by law?

Surely it would harm the government more to *wait* "*some time*" for the cost of survey from the purchaser at a tax sale than to wait for them from the company or one of its grantees.

The anxiety of the appellant for the welfare of the government is phenomenal; it arrogates to itself, as we have seen, the right to convey any lands within its grant; to bring actions of ejectment against those who possess

them : in short, to do anything which an absolute owner in fee might do with his property. Yet, when sought to be charged with the inevitable burdens of ownership, it becomes the protector of its own grantor, and asks :

In case of a tax sale under territorial laws " what then will *become of the government's outlay for surveys ?*"

What an expression of corporate sympathy for the general welfare of the United States !

Can any rule be found declaring that sales by this corporation of its lands within the limits of its grant would *not* divest the government of any title or legal interest it retained in them, while a tax sale of the same lands *would ?*

Certainly no such authority can be found.

All that the taxing authorities ask is : " If the United States permits this corporation to sell these lands as its own to pay its debts, let us sell them for the company's default of payment of taxes, that we may pay public expenses."

And a sale in one case affects the government's right or title as much as the other.

These questions must be answered before appellant can be entitled to relief.

It is impossible to estimate the importance of this case to the people along the line of this great railroad.

Nearly if not quite fifty millions acres of land must be withheld from or subjected to taxation by the decision of this court.

Thousands of families have settled on alternate sections of government land within the boundaries of this grant ; they have toiled for years to build for themselves and their children comfortable homes on land given them by the government ; and every day's labor of these people has added to the value of the railroad lands contained in the grant.

Yet they, by the laches of this company, have been compelled to bear all the burdens of government, unaided by the richest land owner in the United States, the appellant in this case. They feel that the attitude of this corporation is not only hostile to themselves but to their country.

That it is wrong in its dealings with both.

In this case the people look with confidence to the highest and most respected tribunal of the land for a redress of grievances, and for a judgment that shall declare the right.

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MILLER & GREENE,
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